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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

August 30, 1982

* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General
Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General
Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PENNA *
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.

* *Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. May a court of appeals, when reviewing the exercise of the Secretary of Transportation's discretion under the National Traffic and Motor Vehicle Safety Act of 1966 to determine the content of "appropriate" safety standards, invalidate as arbitrary and capricious the Secretary's decision to rescind his earlier regulation setting prospective passive restraint requirements because the court finds that decision to violate a congressional "mandate" the court divines from congressional rejection of bills that would have required or prohibited passive restraints and rejection of resolutions that would have vetoed the earlier regulation?

2. When a court of appeals concedes that an agency's reasons for rescinding prospective passive restraint requirements would justify declining to adopt such requirements in the first instance, may the court reject these same reasons as arbitrary and capricious when used to support the agency's decision to rescind the requirements it had previously issued?

3. When an agency finds that changed circumstances create "substantial uncertainty" whether a previously issued regulation will achieve its purpose, may the court declare the agency's decision to rescind that prospective regulation arbitrary and capricious solely because the agency could not find that the regulation would *not* achieve its purpose?

4. May a court of appeals invalidate an agency's rescission of its own prospective regulation as arbitrary and capricious because the agency failed to consider regulatory alternatives that were neither raised by the agency's notice of proposed rulemaking nor foreclosed by the agency's rescission order under review?

5. Is it an unlawful invasion of the primary jurisdiction of an agency for a court of appeals, after remanding

an agency's rescission of its own regulation for further agency consideration, to reverse its own order and reinstate the regulation by a date certain, regardless of whether the further agency proceedings have been completed, and regardless of how the agency might resolve the issues remanded?

LIST OF PARTIES BELOW

State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, Leorlin Boyd, National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung were petitioners in the proceedings below. The Department of Transportation, Drew Lewis, the National Highway Traffic Safety Administration, and Raymond A. Peck, Jr. were respondents below. Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., Automobile Importers of America, Inc., Consumer Alert, Pacific Legal Foundation, and Albert B. Lewis, Superintendent of Insurance for the State of New York, were intervenors below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Motor Vehicle Manufacturers Association of the United States, Inc., the Automobile Importers of America, Inc., and six leading manufacturers of passenger cars,[1] respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered June 1, 1982, and the subsequent Order and Memorandum of that court issued August 4, 1982.

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[1] The manufacturer petitioners are American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc. A list of parent companies, subsidiaries, and affiliates of each of these member companies is set forth in App. J.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in this case, *State Farm Mutual Automobile Insurance Co. v. DOT*, 680 F.2d 206 (D.C. Cir. 1982), is reproduced at App. 1a. The court's subsequent unpublished Order and Memorandum of August 4, 1982 are reproduced at App. 79a. The decision of the National Highway Traffic Safety Administration ("NHTSA"), 46 Fed. Reg. 53419 (1981), is reproduced at App. 88a.

JURISDICTION

Jurisdiction to review the court of appeals' June 1 judgment and its subsequent August 4 order is vested in this Court by 28 U.S.C. § 1254(1), as further provided in 15 U.S.C. § 1394(a)(4).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 706, and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* ("Safety Act"), are set forth at App. 162a, 163a.

STATEMENT OF THE CASE

Federal Motor Vehicle Safety Standard 208 ("Standard 208") currently requires that motor vehicle manufacturers install "active" seatbelt restraints in all passenger cars. This case arises out of an October 1981 decision by NHTSA to rescind those prospective provisions of Standard 208 that would have required installation of "passive" restraints beginning in September 1982.[2] NHTSA's decision was based on its determination that new circumstances arising after the stand-

[2] "Passive" restraints are defined by NHTSA as those occupant restraint systems that afford protection in frontal crashes "by means that require no action by vehicle occupants." 49 C.F.R. § 571.208 (S4.1.3(a)) (1981). The terms "passive" and "automatic" are sometimes used interchangeably. The seatbelts presently required by Standard 208 as standard equipment in all passenger cars are referred to as "active" restraints.

ard was issued created substantial uncertainty about the probable usage rates of passive restraints and that because of this uncertainty a standard requiring their installation in all cars was not justified under the statutory mandate that safety standards be reasonable, practicable, and meet the need for motor vehicle safety. On the petition of certain automobile insurance companies and others under 15 U.S.C. § 1394(a)(1), NHTSA's decision was invalidated by the United States Court of Appeals for the District of Columbia Circuit as "arbitrary and capricious," and remanded for further consideration of certain issues before any final agency decision to maintain, amend, suspend, or rescind the passive restraint requirements. In a subsequent order of August 4, 1982, the court of appeals *sua sponte* made those requirements effective on September 1, 1983, subject to further consideration of any request by NHTSA to extend that effective date. App. 79a.

A. Summary History of Standard 208

The agency's October 1981 decision followed a long and sharply disputed regulatory debate about the measures appropriate, under NHTSA's statutory authority to issue federal motor vehicle safety standards,[3] to reduce the

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[3] The Safety Act authorizes the Secretary of Transportation to issue "appropriate" federal motor vehicle safety standards. 15 U.S.C. § 1392(a). The Act requires that any safety standard "shall be practicable, shall *meet the need for motor vehicle safety*, and shall be stated in objective terms," *id.*, and defines motor vehicle safety in terms of protection against "*unreasonable risk*," *id.* § 1391(1) (emphasis supplied). The Act further requires that, "[i]n prescribing [such] standards," the Secretary shall consider "whether any such proposed standard is *reasonable, practicable and appropriate* for the particular type of motor vehicle . . . for which it is prescribed" as well as "the extent to which such standards will contribute to carrying out the purposes" of the Act. *Id.* § 1392(f) (emphasis supplied). The Act empowers the Secretary to "amend or revoke" any such standard previously issued. *Id.* § 1392(e).

risk of deaths and injuries in the event of a collision. Originally, Standard 208 simply required manufacturers to install seatbelts.[4] This requirement, which is unaffected by the decision under review, affords roughly the same level of protection as passive restraints for those motorists who "buckle up" their seatbelts.[5] However, because historically "only a very low percentage of the motoring population" has actually used seatbelts,[6] the agency commenced a series of further actions to bring about the use of passive restraints. In 1969, the agency proposed to make installation of passive restraints mandatory by specified future dates. Subsequently the dates were postponed, and ultimately the passive restraint requirement was rescinded.[7]

Three major events marked the last eight years of this history.[8] To encourage the use of "active" seatbelts be-

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[4] 32 Fed. Reg. 2408, 2415 (1967).

[5] 41 Fed. Reg. 24070, 24071 (1976). *See also Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1345 n.53 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[6] 34 Fed. Reg. 11148 (1969).

[7] The principal passive restraint technologies developed to date are airbags and passive belts that are detachable. Passive belts that are detachable are those that may be separated once buckled up, usually by a conventional push-button that separates the continuity of belt webbing, as in the "active" belts currently installed in passenger cars. In 1974, NHTSA adopted a rule mandating detachable belts, in light of concerns about emergency egress in a crash. 39 Fed. Reg. 14593 (1974). Later, NHTSA permitted passive belts to include a release feature allowing the belt to "play out" in an emergency, 43 Fed. Reg. 52493 (1978), and one such belt is currently being offered on one line of cars by one manufacturer.

[8] The principal event in the earlier years was the Sixth Circuit's decision in *Chrysler Corp. v. DOT*, 472 F.2d 659 (6th Cir. 1972), upholding the agency's authority to issue a passive restraint standard, and its discretion to require passive over active restraints, but remanding the standard because the compliance testing procedures did not meet the Safety Act's requirement that standards provide "objective criteria."

fore the dates when passive restraints were to become mandatory, NHTSA required the installation of ignition interlocks and continuous buzzers. Because of strong public objection to these devices, Congress amended the Safety Act in 1974 to prohibit any standard that would permit compliance by use of any such device. Congress also provided that any passive restraint requirement that would permit compliance by means of an airbag would be subject to a legislative veto procedure. 15 U.S.C. §§ 1410b(c)-(d). *See* App. 33a-35a.

After enactment of the 1974 amendments, NHTSA thoroughly reviewed its passive restraint policy, noting that "[a] decision has not yet been made on the long-term requirements for occupant crash protection."[9] In December 1976, Secretary of Transportation Coleman decided to continue the existing active restraint requirements "for the indefinite future." 42 Fed. Reg. 5071 (1977).[10] He postponed indefinitely the phased effective dates of the passive restraint requirements, and initiated a voluntary large-scale demonstration program "to exhibit the effectiveness of passive restraint[s]" before they were made mandatory for all new cars. *Id.*[11] A number of the principal manufacturers agreed to produce and offer for sale sufficient cars equipped with passive restraints to carry out the program.

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[9] 40 Fed. Reg. 16217 (1975). *See also* 40 Fed. Reg. 13330 (1975); 40 Fed. Reg. 21063 (1975); 41 Fed. Reg. 24070 (1976).

[10] The Secretary has delegated his statutory authority under the Safety Act to the Administrator of NHTSA, 49 C.F.R. § 501.2(a) (1981), but from time to time the Secretary has personally made decisions concerning passive restraints.

[11] The Coleman decision was premised on the belief that NHTSA should not risk a "poisoning of popular sentiment" toward future regulation by imposing a passive restraint requirement over the clear opposition of most of the driving public, and on the hope that a demonstration program could foster greater public familiarity with and acceptance of passive restraints. DOT, The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection 6-7 (December 6, 1976).

The Coleman demonstration program never materialized. Shortly after succeeding Coleman, Secretary Adams abrogated this program by reproposing passive restraints. 42 Fed. Reg. 15935 (1977). Retracing Coleman's steps, Adams endorsed the Coleman findings on the feasibility, practicability, costs, and life-saving potential of passive restraints as "in all substantial respects correct." 42 Fed. Reg. 34289, 34291 (1977). But Adams concluded that imposing passive restraints by regulatory mandate "is the logical result of those findings." *Id.* Like Coleman, Adams assumed that the principal method of compliance would be by means of airbags, and made no finding concerning whether the detachable passive belts also permitted under his order would actually be used. *Id.* at 34298 & nn. 6-7.[12]

B. NHTSA's Decision in This Case

In April 1981, Secretary Lewis issued a notice of proposed rulemaking initiating the action presently under review. 46 Fed. Reg. 21205 (1981) (App. 147a). Lewis observed that the Adams decision "was based on a variety of key assumptions which, in the light of subsequent events, are no longer valid." App. 150a. The foremost of these was that the agency had "assumed" that consumers would voluntarily use either airbags or passive belts, whichever the manufacturer elected to install. The Adams decision had predicted that 60 percent of passive restraint systems to be installed by manufacturers would be airbag systems; yet Lewis concluded in 1981 that as a result of consumer wariness concerning airbags and reluctance to pay their high costs, "[c]urrent manufacturer plans contemplate almost no installation of airbags, only about 1 percent of the total fleet of new cars." *Id.*[13]

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[12] Adams' decision was upheld in *Pacific Legal Foundation v. DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[13] Lewis further noted that NHTSA had not "anticipate[d] that the switch [from large to small cars] would occur as rapidly as it has, due in large measure to the subsequent oil cut-off of

Because of a concern about "the unlikelihood of public acceptability" of the planned passive restraints (App. 154a), Lewis proposed three possible alternatives, including rescission of the mandatory requirement. The agency also decided to "undertake an intensive public education campaign to induce the public to use their [active] safety belts." App. 152a.

After considering public comments on these proposals, NHTSA elected to rescind the passive restraint requirements. 46 Fed. Reg. 53419 (1981) ("Notice 25") (App. 88a). The agency concluded that "the post-1977 events have rendered it incapable of finding now, as it was able to do in 1977," that passive restraints "would meet all of the applicable criteria" imposed by the Safety Act. App. 93a. It found that 1977 calculations of the benefits of passive restraint requirements "have been substantially if not wholly undermined by drastic changes" in the regulatory environment. App. 96a. Because in 1977 Adams had expected airbags to be the principal method of compliance, he had simply "assumed"—without any proof or findings—that the automatic belts installed in the remaining minority of cars "would be used by 60 to 70 percent of the occupants of those cars." App. 95a. But since compliance with the passive restraint requirements now appeared almost surely to be in the form not of airbags but of passive belts that were detachable, "public reaction to and usage rate of detachable automatic belts" had now become "the most important issue." App. 94a. NHTSA's concerns were heightened because of the

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1979." In 1977, NHTSA had predicted an early 1980's size mix of 23 percent large cars, 53 percent mid-size cars, and 24 percent small cars. "Now," Lewis explained, "the expectation is that [the] new car fleet will consist of 1 percent large cars, 58 percent mid-size cars and 41 percent small cars." App. 151a. These changes had substantial impact on the production costs, and therefore the public acceptability, of airbags.

great costs associated with mandatory passive restraints,[14] and the risk "that adverse public reaction could undermine the effectiveness of both the standard itself and future or related efforts." App. 114a.

NHTSA carefully scrutinized the data on the issue of incremental usage of detachable passive belts in certain cars, and explained in detail why this data did not support any reliable prediction about usage rates for mandatory passive belts. App. 95a-104a. As a result, NHTSA could not "reliably predict even a 5 percentage point increase as the minimum level of expected usage increase." It concluded that "[t]he adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts." App. 104a.

NHTSA found that "[t]his uncertainty and the relatively substantial cost of automatic restraints preclude the agency from determining that the standard is at this time reasonable and practicable" (App. 88a), or that the prospective passive restraint requirements "in their present form meet the need for safety" (App. 104a), as required by the Safety Act,[15] particularly in light of the need to foster public acceptability of the standard. App. 107a-109a. Accordingly, it determined to "rescind" the prospective requirements for mandatory passive re-

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[14] NHTSA noted that the average price increase per car expected from passive restraints was $89. Given the total annual production of more than 10 million cars, this increase would mean a price effect of close to $1 billion, not all of which could be passed on to consumers, who could not be expected to be compensated for those substantial increases by decreased insurance premiums. The agency noted that comments from insurance companies "state that they could not now assure reductions in insurance premiums but would have to first collect a considerable amount of claim data." App. 105a-106a.

[15] *See* note 3 *supra*.

straints. Like Secretary Coleman in 1976,[16] the agency observed that rescission "does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize" (App. 115a) as a result of NHTSA's planned educational campaign to foster seatbelt usage.

C. The Decisions of the Court of Appeals

On June 1, 1982, the court of appeals set aside NHTSA's decision not to impose the mandatory passive restraint requirements at this time. The court held that the "arbitrary and capricious" standard of review applicable in this case "should be given different scope in different contexts." App. 29a. It cited two relevant "contexts" in this case. First, although it never suggested that NHTSA's decision violated the Safety Act itself (App. 31a), the court divined from three later instances of legislative refusal to ban or to require a passive restraint standard congressional "approval" of such a standard. App. 32a, 33a-46a, 74a. It then held that this "approval" imposed a burden upon NHTSA to show by "increasingly clear and convincing reasons" why it "depart[ed] from the path marked by Congress." App. 48a. Second, the court viewed the decision to rescind a regulation once issued as requiring substantially greater justification than a decision not to adopt it in the first instance. Although it upheld each of NHTSA's findings about the factual changes that had occurred since the regulation had been issued (App. 50a-51a), it rejected as insufficient the agency's finding that these changes created "substantial uncertainty" about in-

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[16] In postponing the effective date of the passive restraint requirements in December 1976, Secretary Coleman emphasized that "I have not in any way foreclosed a future Secretary . . . from [determining] . . . either to place a termination date on Standard No. 208 or to mandate passive restraints on some or all passenger cars." 42 Fed. Reg. at 5071.

creased usage rates for detachable passive belts. "NHTSA has some burden," it held, "to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so"; this burden precluded rescission unless the agency relied on evidence affirmatively showing that usage rates would not "increase by the necessary amount . . . ." App. 51a.[17] The court held that it was "arbitrary and illogical" to rescind—rather than "to suspend or amend"—passive restraint requirements without "evidence that seatbelt usage will fail to increase as was expected" in 1977. App. 49a, 54a. The majority also held that it was arbitrary to rescind while failing to "consider or analyze obvious alternatives to rescission." App. 49a.[18]

In remanding, the court specifically "declin[ed] the suggestions" of petitioners below that it order the passive restraint provisions into effect by September 1982 or September 1983. App. 72a. The court said its remand "d[id] not foreclose" rescission or suspension consistent with its opinion. *Id.* *See also* App. 54a. The court required the agency to submit to the court within 30 days "a schedule for resolving the questions raised in this opinion . . . ." App. 74a.

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[17] In three separate parts of its opinion, the court mistakenly stated that NHTSA had found that passive restraint requirements would fail to increase seatbelt usage by 13 percentage points. *See* App. 17a, 51a, 53a-54a. NHTSA made no such findings. Its actual finding on this question is quoted above. *See* page 8 *supra*. At a fourth point, the court similarly asserted that the agency had "repeatedly emphasized" that any increase in usage from detachable passive belts "would be 'extremely small . . . .'" App. 21a. The passage partially quoted by the court is actually an agency finding that "*If* the percentage increase is zero or extremely small . . . , data regarding manual belt usage would be reliable as a guide . . . ." App. 104a (emphasis supplied).

[18] In concurring with Judge Mikva's majority opinion, Judge Edwards "d[id] not accept" the failure to consider these alternatives "as a basis for decision in this case." App. 75a.

NHTSA thereupon filed a proposed schedule for further agency action on July 1, 1982. App. 130a.[19] On August 4 the court denied motions for extension of time to file rehearing petitions, directing that "the mandate [for the June 1 judgment] of the Court will therefore issue accordingly." App. 85a. On August 4 the court also held that NHTSA's proposed schedule was "not inconsistent with the Court's order" of June 1. Nevertheless, in spite of its previous rejection of a September 1, 1983 effective date, and its previous refusal to set any effective date itself, it now held that "Standard 208 remains fully in force," and "stayed" the effective date of the standard's mandatory passive restraint requirements only until September 1983. App. 80a, 81a. It gave NHTSA until October 1, 1982 "to advise the Court . . . whether a longer period is required, setting forth adequate reasons therefor." App. 80a.

REASONS FOR GRANTING THE WRIT

I. THROUGH ITS ADMITTEDLY "UNUSUAL" AND UNPRECEDENTED USE OF POST-ENACTMENT LEGISLATIVE EVENTS, THE COURT BELOW IGNORED THE PREROGATIVE OF CONGRESS TO DELEGATE DISCRETION TO ISSUE APPROPRIATE SAFETY STANDARDS TO THE SECRETARY AND IMPROPERLY BROADENED THE LIMITS OF ARBITRARY AND CAPRICIOUS REVIEW.

As the court of appeals stressed repeatedly,[20] the Safety Act provides that the agency's orders shall be subject to

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[19] The agency proposed to solicit comments on the issue of predicted usage, particularly of detachable passive belts, and proposed guidelines for studies of this issue. It also solicited proposals for other regulatory alternatives. Finally, the agency outlined steps it was taking to develop a program for voluntary introduction of airbag options in new car lines, including the possibility of participation of federal government fleets in this demonstration program. App. 132a-138a.

[20] App. 4a, 25a, 26a, 28a, 32a, 49a, 56a, 62a, 68a. *See* 15 U.S.C. §§ 1392(b), 1410b(c)(2).

judicial review under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("Section 706(2)(A)"). Despite this clear mandate, the court of appeals concluded that "[t]he appropriate scope of judicial review remains the most troublesome question in this case . . . ." App. 25a. The court held that this same arbitrary and capricious standard of review "should be given different scope in different contexts" (App. 29a), "depending in part on 'the nature of the particular problem faced by the agency.'" App. 26a. The court devoted 25 pages to an effort at "formulating" the particular meaning it deemed to be "appropriate" for the arbitrary and capricious standard in this case. *See* App. 24a-49a. What it formulated was a judicial license to intrude on the agency's "essentially legislative" [21] discretion by interpreting congressional activities that it conceded did not "carr[y] the weight of positive law" (App. 31a, 46a) as a basis for overruling NHTSA's determinations as "arbitrary and capricious." This admittedly "unusual" (App. 32a) expansion of the "arbitrary and capricious" standard infects every aspect of the court's review.[22] It has no precedent in the deci-

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[21] *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (upholding Standard 202).

[22] Though recognizing that the provisions of the Safety Act itself gave the agency discretion whether or not to issue a regulation like Standard 208 (App. 31a), the court variously stated that NHTSA's decisions must be "in accordance with the purposes for which power has been delegated" (App. 4a); that "an agency is not a legislature" (App. 31a); that in this case there are "'danger signals' that the will of Congress is being ignored" (App. 31a); that agencies "have no authority to act inconsistently with their statutory mandate" (App. 32a); that it was required to consider "the extent to which NHTSA's action may be inconsistent with the congressional purpose" (*id.*); that searching review was essential "lest the congressional will be ignored" (App. 46a); that "NHTSA is not writing on a clean slate" (App. 47a); that scrutiny depended upon the extent of "deviat[ion] from congressional expectations"

sions of this Court or any other court,[23] and if left unreviewed would substantially undermine the APA's careful division of responsibilities among Congress, agencies, and the courts.

As a unanimous Court held in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523 (1978), the APA was "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'"[24] The scope of review under the "arbitrary and capricious"

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and "the path marked by Congress" (App. 48a); that NHTSA "violates its basic legislative mandate" (App. 49a); that "NHTSA lost sight of its statutory obligation" (App. 56a); that "NHTSA errs when it presumes that it knows how to speak more clearly than Congress" (App. 60a); that "NHTSA may not confuse its role with that of Congress" (App. 71a); and that "agencies may not ignore the mandate they have received from Congress" (App. 74a).

[23] A number of lower court opinions address the distinction between "arbitrary and capricious" and "substantial evidence" review, which latter standard the court held inapplicable in this case. App. 26a-28a. *See National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 829-30 & n.23 (D.C. Cir. 1980). Other cases distinguish between the "circumspection" required in substantive review of rules "in an area fraught with scientific uncertainty" and the rigorous review in executing the traditional judicial functions of "interpreting statutory directives and enforcing procedural rectitude." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024-28 (D.C. Cir. 1978). *Compare* 5 U.S.C. § 706(2)(A) *with id.* § 706(2)(C) *and id.* § 706(2)(D).

Here, the court of appeals upheld the agency's factual findings. App. 50a-51a. It recognized that "there is no claim that the agency has exceeded its jurisdiction" under the Safety Act. App. 31a. And it "d[id] not reach" any claim of procedural error. App. 60a n.34.

[24] Changes in this formula are, of course, within the prerogative of Congress, although efforts to alter Section 706(2)(A) to provide for greater judicial scrutiny of agency rulemaking have met with strong opposition. *See, e.g.*, H.R. Rep. No. 435, 97th Cong., 2d Sess. 72-80 (1982) (rejecting Bumpers amendment).

standard is in every case "a narrow one," [25] because when the agency acts "pursuant to the legislative authority delegated by Congress, [it] exercises the prerogatives of the legislature." *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 663 (1980) (Burger, C.J., concurring). The court's use of legislative materials postdating the agency's governing statute to label as arbitrary and capricious under Section 706(2)(A) what clearly was not "in excess of statutory . . . authority" under Section 706(2)(C) [26] improperly expands the established limits of the arbitrary and capricious standard of review.

As the court of appeals recognized, none of the three instances of legislative activity during the years following the Safety Act on which it relied to legitimize its expanded scope of arbitrary and capricious review "carries the weight of positive law." App. 46a. The first instance was Congress' failure to prohibit a mandatory passive restraint standard in 1974, when it *did* prohibit compliance by means of ignition interlocks or continuous buzzers for seatbelts and *did* impose a congressional veto procedure for any future airbag standard. *See* App. 33a-36a. Whatever this failure may say about the intentions or motives of individual members of the House or Senate would be a hazardous speculation for any court.[27] But the only relevant

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[25] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *accord, Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 803 (1978).

[26] See App. 31a: "Even when there is no claim that the agency has exceeded its jurisdiction, as there is not in this case, . . ." (citing 5 U.S.C. § 706(2)(C)).

[27] The accuracy of the court's measurement of the congressional pulse is open to serious question. We believe it unnecessary to address this issue in detail in this Petition; the point here is that Congress did not alter the agency's broad discretion under the Safety

fact on review of NHTSA's action under the arbitrary and capricious standard in this case is that in 1974 Congress did *not* alter the agency's statutory discretion to decide whether to impose mandatory passive restraints in the first instance. Nor did Congress do so in 1977, when legislative veto resolutions disapproving the mandatory passive restraint standard were tabled in both houses. *See* App. 36a-38a.[28] The court's further reliance upon a third period of legislative activity—proposed amendments that did not find their way into NHTSA's 1980 authorization bill—is equally novel. It would require courts to draw inferences of "arbitrary" or "capricious" agency action based solely on their own interpretations of the internal parliamentary rules of the Senate and House of Representatives.[29]

Act. It never directed NHTSA to enact any mandatory passive restraint requirement and never took any legislative action approving NHTSA's prior issuance of such a requirement.

[28] The court's negative inference from the failure of legislative veto resolutions is particularly far-reaching. Even assuming its constitutionality, *see Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3244 (U.S. October 5, 1981), *restored for reargument*, 50 U.S.L.W. 3998.27 (U.S. July 2, 1982), Congress expressly provided that the veto procedure "shall not impair any right which any person may have to obtain judicial review" of Standard 208 or any other safety standard. 15 U.S.C. § 1410b(e). While petitioners do not seek review of Standard 208 in this case, the clear purpose of Section 1410b(e) is to prevent precisely the sort of negative inference drawn by the court of appeals.

[29] The court of appeals relied upon a conference report revision that would have both prohibited NHTSA from barring fully detachable passive belts and required it to impose optional airbag requirements on at least one car line per manufacturer. This conference report failed to pass the House by the two-thirds vote that the rules of that body required under the circumstances. App. 38a-46a. Thus, it was not enacted, and did not limit the agency's discretion under the Safety Act—just as another House amendment to the same bill, which would have *prohibited* mandatory passive restraints, was not passed in the House when it, too, garnered only a majority vote. App. 45a-46a.

Reliance on any of the foregoing activities would be a highly questionable way of ascertaining the meaning of the Safety Act.[30] But the court's unprecedented use of them in this case to alter the meaning of arbitrary and capricious review was nothing short of an exercise in "substitut[ing its] judgment" for that of the agency delegated authority to resolve these essentially legislative questions. The court's decision thereby clearly conflicts with this Court's leading decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The court's fundamentally misguided view of the separation of powers incorporated in Section 706(2)(A) poses serious consequences for the future of the court-agency "partnership." [31] The court's decision here is of special concern, for, as this Court has acknowledged, "the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit." [32] Because of its broad threat to the policy-making functions of Congress and the administrative agencies, the decision below warrants review by this Court.

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[30] Even the legislative history of subsequent *statutes* carries little if any weight in ascertaining the meaning of earlier statutes. *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980). Post-enactment oversight activities are even less reliable for that purpose. *See TVA v. Hill*, 437 U.S. 153, 189-91 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). In this case, the court of appeals was using subsequent legislative events (and non-events), not as aids to statutory interpretation, but to "formulate" a new standard of judicial review under the APA.

[31] *See generally Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

[32] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 n.14 (1978).

II. BY IMPOSING ITS OWN POLICY PREFERENCE THAT REGULATIONS MUST REMAIN IN PLACE UNLESS THEY CAN BE *PROVEN* INEFFECTIVE, THE COURT BELOW HAS POSED A SERIOUS CHALLENGE TO THE CONTINUED ABILITY OF ADMINISTRATIVE AGENCIES TO EXERCISE THEIR DELEGATED STATUTORY AUTHORITY.

The court of appeals recognized that "the course of administrative action is frequently and inevitably characterized by shifts and turns, as agencies continually reassess what is in the public interest." App. 48a. But here the court held "arbitrary and illogical" (App. 49a) an agency decision in 1981 to rescind a 1977 regulation before its effective date for reasons the court conceded would have been upheld as a basis for not adopting the regulation in 1977. It accepted the agency's view that compliance would be achieved almost entirely by installation of passive belts that are detachable, and agreed that "[t]here may well be 'substantial uncertainty'" about increased occupant use of such belts. And it specifically held that, had "substantial uncertainty" on this point existed in 1977, NHTSA could not have issued the rule in the first instance. App. 50a-51a. But the court held that the agency, having once issued the rule, had to meet a higher standard of rationality in changing its regulatory policy to meet the new circumstances that had arisen:

> "[T]he question is not whether evidence shows that usage rates will increase by the necessary amount [if the standard takes effect], but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so." App. 51a.

The clear result is to impose a policy preference for more rather than less regulation under the guise of the arbitrary and capricious test. The court held that in order to rescind a regulation (even one that had not yet

taken effect), the agency must establish more than a reasonable basis for doubt, after notice and comment, whether the regulation continued to meet the statutory requirements. Rather, under the court's decision the agency must meet the higher burden of establishing affirmatively that those statutory requirements are *not* met. This unprecedented judicial presumption in favor of continued regulation—which has already been followed by the court of appeals in a more recent case[33]—is plainly contrary to the language of the Administrative Procedure Act and the decisions of this Court and threatens the vitality of the entire administrative process.

As this Court has long held, "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). *See also NLRB v. Iron Workers Local 103*, 434 U.S. 335, 351 (1978). Adaptability is the real genius of the modern administrative process:

> "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967).

This flexibility is especially appropriate and necessary in the promulgation of rules of general applicability.[34] An

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[33] *See Natural Resources Defense Council, Inc. v. Gorsuch*, No. 81-2208 (D.C. Cir. August 17, 1982), slip. op. at 19 n.41 (quoting *State Farm*):

> "EPA 'has some burden . . . to show that a regulation once considered to [effectuate policy] efficiently can no longer be expected to do so' " (brackets in original).

[34] *See generally National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 680-84 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Indeed, although not requiring agencies to formulate new policy

agency engaged in making the essentially legislative judgments of rulemaking should be permitted to adapt its policy not only to take account of "[c]hanges . . . in objective circumstances," but also to provide for changes "in the way the agency perceives the critical facts." *FTC v. Texaco, Inc.*, 555 F.2d 862, 893-94 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring), *cert. denied*, 431 U.S. 974 (1977).[35] In fact, where basic changes in the regulatory environment have occurred, agencies may well be *required* to alter past regulatory policies, by statute or even by the requirements of the Constitution. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (Holmes, J.) (upholding Fifth Amendment challenge to post-war continuation of rent regulations). In *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979)—a decision relied upon by the court below (App. 32a)—the FCC was required to reconsider certain cable television copyright rules because the FCC was "plainly . . . unprepared to say that the regulations were [still] consistent with the public interest."

This case, of course, does not raise the question whether, if NHTSA had exercised its statutory discretion to con-

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through rulemaking, this Court has suggested that rulemaking is especially appropriate for undertaking this legislative task. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-95 (1974) (failure to use rulemaking in departing from prior decisions was not an abuse of agency discretion).

[35] Of course, a "departure from prior norms" must be "clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). *See also NAACP v. FCC*, No. 80-2416 (D.C. Cir. June 29, 1982), slip op. at 7-8 (upholding FCC's rescission of top 50 policy where the agency adequately set forth its view of changed circumstances). But here the court required far more than that, because it conceded that an agency's refusal to adopt the passive restraint requirement would have been upheld in 1977 had the facts been then as the court agreed they were in 1981.

tinue rather than rescind the passive restraint requirement, such a decision would have violated the Safety Act. The question here is whether NHTSA was entitled to exercise its statutory discretion one way rather than another. NHTSA's decision was simply one further stage of a novel and controversial regulatory program that had already undergone dramatic "shifts and turns" (App. 48a), as the agency reevaluated the requirements originally proposed in 1969. Like Secretary Coleman in 1976, and like Secretary Adams in 1977, Secretary Lewis reconsidered the need for passive restraints. Like Adams' previous "departure from prior norms," *see* note 35 *supra* —which was upheld as a proper exercise of administrative discretion though it reversed the course adopted by Coleman only six months before[36]—this determination was preceded by a full period of public comment and a reasoned articulation of the basis for the agency's decision. In fact, here—unlike the Adams decision—the agency identified important changes in the regulatory environment, changes that made critical for the first time the accuracy of agency judgments regarding the expected use of passive seatbelts.[37]

Despite these fundamental changes, the court caustically rejected NHTSA's reevaluation. In doing so, it offered no reason why the discretion of agencies to alter their regulatory policies upon "[c]hanges . . . in objective circumstances" or "in the way the agency perceives the critical facts," *FTC v. Texaco, Inc.*, *supra*, 555 F.2d at 893-94, should be any less applicable where the agency seeks to suspend, rescind, or modify existing rules—especially prospective ones—than when it adopts, or decides against adopting, entirely new rules. The court specifically recognized that this issue presented "a matter of first impression" (App. 25a), but the only rationale of-

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[36] *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[37] *See* pages 6-7 *supra*.

fered by the court was its *own* presumption that regulations "can . . . be expected" to have continuing justification.[38] Absent a specific direction by Congress, however, it is certainly rational for an agency to decide, as NHTSA did here,[39] that major regulatory burdens should continue only as long as they can be shown to be achieving an identifiable statutory goal or purpose.

The court's unprecedented holding is plainly inconsistent with *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), in which this Court strongly counseled the lower courts against substituting their policy preferences for the considered judgments of agencies that prior regulatory policies have become outmoded. There, the FCC had concluded that it "would have no assurance" that a continuation of its policy of regulating radio program formats would provide any greater listener satisfaction than that resulting from the marketplace incentives of broadcasters. *See id.* at 595-96. The court of appeals invalidated the FCC's policy statement, reading into the Communications Act an obligation to scrutinize changes of format at the time of transfer or renewal. This Court reversed, upholding the agency's determina-

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[38] There is certainly no factual basis for the court's presumption in this case. The "regulation once considered [by the agency] to prevent deaths and injuries efficiently" was based on the prediction that 60% of all cars would have airbags, and the *assumption* that some 60 to 70% of the occupants of cars equipped with passive belts would use them. This 60-70% figure was purely an assumption—not a finding—and was irrelevant to the decision to adopt a mandatory passive restraint requirement since the finding of 60% airbag usage was sufficient to justify the safety benefits of the standard. *See* page 6 *supra*. Before Notice 25 the agency never had occasion to examine seriously the question of usage rate for passive belts.

[39] Notice 25 stated that "NHTSA has a duty under the Vehicle Safety Act and E.O. 12291 to review the automatic restraint requirements in light of changing events and to ensure that the requirements continue to meet the criteria which each Federal Motor Vehicle Safety Standard must satisfy." App. 93a.

tion to abandon format regulation as a judgment "entitled to substantial judicial deference." *Id.* at 596. In doing so, it applied precisely the same deference to a policy of not regulating in conditions of regulatory uncertainty applicable to decisions to regulate under such conditions.[40]

The court of appeals in this case intruded even further into the realm of agency decisionmaking. In remanding the case, the majority emphasized that NHTSA would have to consider a wide range of alternatives to rescission—including a number pressed by the court but never proposed in rulemaking, most notably an "airbags only" standard. App. 54a-68a. This requirement to canvass additional alternatives would certainly have been inconsistent with this Court's decision in *Vermont Yankee* in the context of an original decision whether to issue a standard,[41] and the court did not suggest that such an undertaking could have been required. It was no more lawful to do so here simply because the agency determined to rescind its prior regulation. An agency need not consider every alternative, or solve every regulatory problem, before deciding upon a present course of action.[42] Here, as in 1976, the agency did not *foreclose*

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[40] *See American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 528 n.52 (1981); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 699-701, 706, 722-23 (1980) (Marshall, J., dissenting).

[41] In *Vermont Yankee*, this Court not only limited the power of reviewing courts to impose additional procedures on an agency proceeding in conformity with the APA, but also specifically rejected a challenge, under NEPA, to the failure to consider alternative regulatory policies. *See* 435 U.S. at 551.

[42] *See REA Express, Inc. v. United States*, 568 F.2d 940, 950 (2d Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967).

This freedom of the agency to control its own docket is particularly essential in NHTSA's case, for the Safety Act specifically contemplates a procedure of readjustment of safety standards in light

further rulemaking to consider the policy alternatives set forth by the majority in its opinion; it simply decided that it could not at this time justify continuing the mandatory passive restraint portion of the standard on the present record. *See* pages 8-9 *supra*. The majority's determination that the agency must consider a wide range of other regulatory alternatives because in their view under conditions of uncertainty continued regulation in some form is presumed to be better than none is simply not a determination that the courts of appeals are permitted to make.[43]

The error of the decision below has particular significance today. There is now widespread agreement throughout the American political spectrum with the view that existing regulations must be carefully reexamined to ensure that they do not pose undue regulatory burdens upon economic efficiency.[44] This "regulatory reform" movement has received endorsement not only from Con-

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of changes in the regulatory environment and advances in relevant safety technology. *Chrysler Corp., supra*, 472 F.2d at 680. *See also* 15 U.S.C. § 1410a (statutory procedure for petitioning NHTSA to issue an order in a standards proceeding).

[43] The court's dominating preference for regulation shows up elsewhere. At the outset of its opinion, the court quoted the Safety Act's requirement that standards must be "practicable" and "meet the need for motor vehicle safety." App. 5a; *see* note 3 *supra*. From there on, the practicability requirement—and the agency's specific findings on this point—drop completely out of the court's analysis. Balancing the "practicable" and "safety need" criteria is, of course, one of the difficult but vital tasks delegated to the agency by Congress, which specifically defined motor vehicle safety in terms of "unreasonable" risk. 15 U.S.C. § 1391(1).

[44] NHTSA estimated that its action saved $1 billion annually in variable manufacturing costs and consumer costs and an additional $150 million annually in fuel costs saved by the continued installation of active belts. App. 117a.

gress [45] but also from the Executive Branch and the independent regulatory agencies. In Executive Order No. 12291, 46 Fed. Reg. 13193 (1981), the President established a formal program for agency review of "major" regulations, applicable to agencies other than independent regulatory agencies, whose goal is to identify and eliminate outmoded regulatory programs. The guiding premise of the regulatory review program is that "the federal government should not regulate unless there is a demonstrated need." [46] A wide variety of major regulatory programs have been in various stages of review and reformulation, not only under this Executive Order [47] but also by independent regulatory agencies under their own initiatives.[48] A number of actions taken as a result of these reviews have already been challenged in the federal courts.[49] The decision below raises a formidable

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[45] *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351; Federal Trade Commission Improvements Act of 1980 §§ 11, 15, Pub. L. No. 96-252, 94 Stat. 374; Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164; Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812.

[46] *See* Presidential Task Force on Regulatory Relief: Reagan Administration Achievements in Regulatory Relief ii (August 1982).

[47] Since January 1981, the Task Force has designated 111 existing regulatory programs for high-priority agency review. Already 51 of these programs have been revised or rescinded; 35 more are currently subject to deregulation proposals, generally under notice-and-comment procedures similar to that employed by NHTSA in this case. *See id.* at 3-37.

[48] *E.g.*, *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *appeal pending sub nom. Office of Communication of the United Church of Christ v. FCC*, Nos. 81-1032 *et al.* (D.C. Cir.); 47 Fed. Reg. 36453 (1982) (proposing elimination of FCC program logging requirements).

[49] *See Natural Resources Defense Council, Inc. v. Gorsuch*, No. 81-2208 (D.C. Cir. August 17, 1982); *Natural Resources Defense*

judicial obstacle to these regulatory policy judgments in favor of deregulation and should not go unreviewed by this Court.

III. THE COURT'S AUGUST 4 ORDER IMPERMISSIBLY PREEMPTED THE AGENCY'S PRIMARY JURISDICTION TO MAKE THE FURTHER DETERMINATIONS REQUIRED BY THE COURT'S OPINION.

In remanding this case, the court of appeals raised a number of questions for NHTSA's further consideration,[50] noting that "[o]ur decision does not foreclose rescission . . . ." App. 72a. Even on the present record, the court apparently held, NHTSA "could reasonably have decided to suspend or amend the regulation rather than plunge ahead in the blind faith that the standard would succeed." App. 54a.[51] The court asked that NHTSA "recommend" to it a timetable for agency analysis of the issues raised in the court's opinion. App. 72a. It specifically rejected requests to set an effective date, since the question of what if any passive restraint requirement would be appropriate had not yet been determined by NHTSA. *Id.*

On August 4, however, the court made two fundamental changes in direction, without giving NHTSA (or

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Council, Inc. v. EPA, No. 81-2068 (3d Cir. July 8, 1982); *Deregulation of Radio*, *supra*; *International Ladies' Garment Workers Union v. Donovan*, Civil Action No. 81-2606 (D.D.C. July 23, 1982); *Center for Science in the Public Interest v. Department of the Treasury*, Civil Action No. 82-0610 (D.D.C.).

[50] The court specifically acknowledged that "changed factors—higher gasoline prices, smaller cars, an ailing automobile industry, and the methods of compliance being pursued by that industry—may fully justify reassessing, modifying, and even deferring the effective date of the regulations . . . ." App. 74a.

[51] Since Notice 25 expressly leaves open the possibility of future rulemaking leading to a new passive restraint requirement (*see* page 9 *supra*), the court's distinction between suspension and rescission is not apparent.

these petitioners) either notice or opportunity for comment. First, although finding NHTSA's recommended timetable "not inconsistent" with its prior order, the court neither adopted nor rejected that timetable, apparently leaving the course of further proceedings to NHTSA's discretion. But the court reinstated Standard 208 and extended its effective date to September 1, 1983. It thereby reversed its June 1 decision not to fix that or any other date but to leave the matter of effective dates to NHTSA, as the statute expressly provides.[52] Because of this action manufacturers are faced with an insoluble dilemma. Regardless of the amount of human and financial resources they may devote (assuming their availability in the necessary measure) to an effort to comply with Standard 208, some or all of them may still find themselves in a position where they may not lawfully sell their cars because they do not comply with that standard as it may emerge from the additional rulemaking foreshadowed in the June 1 opinion. The June 1 opinion recognized this dilemma, noting that manufacturers "would justifiably feel uncertain about the technology that satisfies . . . Modified Standard 208." App. 72a.

Second, by naming that effective date (or any other date), the court cast aside its earlier commitment to an orderly process in which the agency would first conduct proceedings to resolve the issues raised in the court's June 1 opinion and then determine any appropriate revised effective dates for whatever standard, if any, it might adopt. While the court requested the agency to report by October 1 whether the September 1, 1983 effective date was "achievable," [53] it emphasized that the September 1, 1983 date is presently binding. App. 80a, 81a-82a.

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[52] 15 U.S.C. § 1392(c) provides NHTSA with authority to extend the effective date of federal motor vehicle safety standards. *See Chrysler Corp., supra*, 472 F.2d at 673.

[53] The applicable statutory criterion—"practicable"—delegates a considerably different policy judgment to the agency. 15 U.S.C. §§ 1391(2), 1392(a).

We respectfully submit that the court's action unlawfully invades the primary jurisdiction of the agency, upon remand, to determine in the first instance whether, when, and in what form any mandatory passive restraint requirements should be adopted, and what procedures should appropriately be used to answer these questions. As this Court cautioned in *Vermont Yankee*:

> " 'At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." ' " 435 U.S. at 544-45, *quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).

See also NLRB v. Pipefitters Local 638, 429 U.S. 507, 522 n.9 (1977).[54]

This Court has on numerous occasions strongly counseled the courts of appeals not to assume such functions delegated by Congress to the agency in the first instance. In *Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 817-26 (1973), the district court had overturned an ICC rate increase and entered in-

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[54] The Sixth Circuit recognized these established guidelines when, after invalidating the compliance procedures of NHTSA's passive restraint requirement, it delayed the effective date of that requirement "until a reasonable time [to be determined by the agency] after [new] test specifications are issued." *Chrysler Corp., supra*, 472 F.2d at 681.

junctive relief against the carriers, prohibiting the imposition of increased rates pending remand. This Court held such an injunction unlawful, and in disregard not only of the particular statutory scheme involved in that case but also of "the division of function which the legislature has made between the administrative body and the court of review." *Id.* at 819. As the Court observed, for the court of appeals to articulate its own beliefs about such public policy questions "prior to an expression by the Commission of its view" is "precisely what the doctrine of primary jurisdiction is designed to avoid." *Id.* at 821. Failure to adhere to these principles is such plain error that it has merited summary reversal. *E.g.*, *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981); *Long Island R.R. v. Aberdeen & Rockfish R.R.*, 439 U.S. 1, 4-6 (1978).

Federal courts abuse their authority and venture outside their limited role in the administrative process when they attempt to reinstate regulations *sua sponte*.[55] In this case, the court of appeals' disposition pending remand apparently proceeded from its own policy view that "[t]he implementation of a passive restraint standard has already been delayed without acceptable reasons, perhaps unconscionably so." App. 72a. Whether that view of a long and difficult rulemaking process is accurate or not—and petitioners submit it is not—it did not jus-

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[55] The Fifth Circuit recognized the dangers of such judicial efforts in *Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092, 1101 (5th Cir. 1976), where it reversed a district court order mandating immediate reinstitution of prior regulations held to have been unlawfully revoked by USDA, as "total displacement . . . of the Secretary's function" not warranted by the district court's equity powers. *See also Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264, 1268-69 & n.7 (D.C. Cir. 1981) (giving effect to rescission of rule pending judicial review of rescission in court of appeals and this Court).

tify the court's arbitrary orders establishing effective dates for rules that concededly remain within the agency's discretion to suspend, modify, or even rescind. Courts are not legislatures, and they do not sit to enact regulatory programs.

CONCLUSION

For the foregoing reasons, petitioners pray that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PEÑA
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner Automobile Importers of America, Inc.

August 30, 1982

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

August 30, 1982

* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General
Counsel
JAMES M. MACNEE, III
Associate General Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General
Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PENNA *
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.

* *Counsel of Record*

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, AS SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., AS ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AUTOMOBILE IMPORTERS OF AMERICA, INC., MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL., CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Intervenors

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL, and EUGENE J. MEYUNG,
Petitioners

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent

AUTOMOBILE IMPORTERS OF AMERICA, INC., CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL., SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Intervenors

Petitions for Review of an Order of the
National Highway Traffic Safety Administration

Argued March 1, 1982

Decided June 1, 1982

James F. Fitzpatrick, with whom *Michael N. Sohn*, *Merrick B. Garland*, *John M. Quinn* and *Robert E. Litan* were on the brief, for petitioners in No. 81-2220.

Raymond J. Rasenberger, with whom *Lawrence C. Merthan*, *Frank J. Costello* and *Richard M. Hall* were on the brief, for petitioners in No. 81-2221.

David W. Allen, Assistant Chief Counsel, National Highway Traffic Safety Administration, with whom *Frank Berndt*, Chief Counsel, *Enid Rubenstein*, *Allan J. Kam* and *Eileen T. Leahy*, Attorneys, National Highway Traffic Safety Administration, were on the brief, for respondents in Nos. 81-2220 and 81-2221.

Lloyd N. Cutler, with whom *John H. Pickering*, *William R. Perlik*, *William H. Crabtree*, *Michael W. Grice* and *William L. Weber, Jr.* were on the brief, for intervenors Motor Vehicle Manufacturers Association, et al., in Nos. 81-2220 and 81-2221.

Ronald A. Zumbrun, *Raymond M. Momboisse* and *Sam Kazman* were on the brief for intervenors Consumer Alert and Pacific Legal Foundation, in Nos. 81-2220 and 81-2221.

Robert Abrams and *Stanley A. Camhi* were on the brief for intervenor Superintendent of Insurance of the State of New York, in Nos. 81-2220 and 81-2221.

Katherine I. Hall was on the brief for *amicus curiae*, Center for Auto Safety, Public Citizen, Physicians for Automotive Safety, and the American Academy of Pediatrics, urging reversal of the rescission of Standard 208.

Philip R. Collins was on the brief for *amicus curiae*, Automotive Occupant Protection Association, urging reversal of the rescission of Standard 208.

Dennis J. Barbour was on the brief for *amici curiae*, American College of Preventive Medicine and American Public Health Association, urging reversal of the rescission of Standard 208.

A. L. Zwerdling and *Stephen I. Schlossberg* were on the brief for *amicus curiae*, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (AFL-CIO), urging reversal of the rescission of Standard 208.

Debbie M. Zuckerman was on the brief for *amicus curiae*, Epilepsy Foundation of America, urging reversal.

Milton D. Andrews and *Lance E. Tunick* entered appearances for intervenor Automobile Importers of America, Inc.

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MIKVA.

Opinion concurring in part filed by *Circuit Judge* EDWARDS.

MIKVA, *Circuit Judge*: Petitioners in this action seek review of a final order by the National Highway Traffic Safety Administration (NHTSA) rescinding the automatic crash protection requirements of Federal Motor Vehicle Safety Standard 208 ten months before the standard's effective date. 46 Fed. Reg. 53,419 (Oct. 29, 1981) (Notice 25). The standard would have required that large and mid-size automobiles manufactured after September 1, 1982, and all automobiles manufactured after September 1, 1983, carry passive restraints such as airbags or "passive" seatbelts. Airbags are cushions stored under the dashboard that, when triggered by a

frontal collision, fill with stored or rapidly generated gas to protect the rider from collision with the car's interior. Passive seatbelts, also called "automatic" seatbelts, move into place automatically when a passenger enters a vehicle and closes the door. Petitioners State Farm Mutual Automobile Insurance Company (State Farm) and the National Association of Independent Insurers (NAII) challenge NHTSA's rescission of the standard as arbitrary, capricious, an abuse of discretion, and a violation of law as defined by section 10 of the Administrative Procedure Act, 5 U.S.C. § 706 (1976).

We agree. This case is complicated because it has far-reaching implications and involves a politically controversial safety standard, but the determining principle is simple. An administrative agency, possessing power delegated by the legislative branch of government, must comply with the legislative requirement that its decisions be reasoned and in accordance with the purposes for which power has been delegated. NHTSA's rescission of the safety standard presents a paradigm of arbitrary and capricious agency action because NHTSA drew conclusions that are unsupported by evidence in the record and then artificially narrowed the range of alternatives available to it under its legislative mandate. NHTSA thus failed to demonstrate the reasoned decisionmaking that is the essence of lawful administrative action.

I. Background

The procedural history of the case before us is extremely complex. The standard that has now been rescinded was the subject of approximately 60 notices of proposed rulemaking, hearings, amendments, and the like between 1969 and 1981. There were separate adjudications before this court and in the Sixth Circuit, and successful as well as unsuccessful attempts in Congress to control the evolution of the regulation. A number of these events must be described in some detail before we

turn to the issues in this case, because they help to put into perspective the course of the agency's action.

A. *The Story of Standard 208 and Notice 25*

Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (the Safety Act), 15 U.S.C. §§ 1381 *et seq.* (1976 & Supp. IV 1980), in response to the alarming number of deaths and personal injuries on the nation's highways. The stated purpose of the Safety Act was "to reduce traffic accidents and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.[1] The Safety Act directs the Secretary of Transportation or his delegate[2] to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. § 1392(a). In issuing these standards, the Secretary is also directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate for the particular type of motor vehicle or items of motor vehicle equipment for which it is prescribed," and "the extent to which such standards will contribute to carrying out the purposes" of the Safety Act. 15 U.S.C. § 1392(f)(1), (3), (4).[3]

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[1] These goals may be met by very different courses of action. NHTSA can act to prevent accidents, or to prevent injuries in the event of accidents—the so-called "second collision." The Senate Commerce Committee expressed concern that "[f]or too many years, the public's proper concern over the safe driving habits and capacity of the driver . . . was permitted to overshadow the role of the car itself. The 'second collision'—the impact of the individual within the vehicle against the steering wheel, dashboard, windshield, etc.—has been largely neglected." S. REP. No. 1301, 89th Cong., 2d Sess. 2-3 (1966), *reprinted in* [1966] U.S. CODE, CONG. & AD. NEWS 2709, 2710-11.

[2] The Secretary's general authority under the Safety Act has been delegated to NHTSA. 49 C.F.R. § 1.51(a) (1979).

[3] Although Congress intended that "safety shall be the overriding consideration in the issuance of standards," S. REP. No. 1301, 89th

Under these guidelines, the Department of Transportation (DOT) issued the original Standard 208 in 1967, requiring seatbelts in all cars. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). By July 1969, however, DOT had concluded that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level. It issued a notice of proposed rulemaking to consider "the prompt development and installation of passive restraint systems," 34 Fed. Reg. 11,148 (July 2, 1969), defined as protective systems that require "no action by vehicle occupants." 36 Fed. Reg. 8296 (May 4, 1971). The agency conducted a lengthy rulemaking proceeding on passive restraint systems. It revised Standard 208 in 1970 to include passive protection requirements, 35 Fed. Reg. 16,927 (Nov. 3, 1970), and after a series of modifications and petitions for reconsideration published a final amendment to Standard 208 in 1972. 37 Fed. Reg. 3911 (Feb. 24, 1972).

The Federal Register during this period provides a strong reminder of how frequently an agency sometimes acts to focus or clarify a regulation before the regulation is promulgated. Not all of the twenty-four notices

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Cong., 2d Sess. 6 (1966), *reprinted in* [1966] U.S. CODE, CONG. & AD. NEWS 2709, 2714, it recognized that "the Secretary will necessarily consider reasonableness of cost, feasibility and adequate lead time." *Id.* The Senate committee also stated that standards "are expected to be performance standards, specifying the required safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance." *Id.* at 6, [1966] U.S. CODE, CONG. & AD. NEWS at 2714. At the same time, the Safety Act is "technology forcing" in the sense that developed technology need not be in use prior to its incorporation into a federal motor vehicle safety standard. *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d 1338, 1344 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979); *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d 659, 671-72 (6th Cir. 1972). "The promotion of motor vehicle safety through voluntary standards has largely failed. The unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll." S. Rep. No. 1301, *supra*, at 4, [1966] U.S. CODE, CONG. & AD. NEWS at 2712.

and amendments to the standard issued between 1970 and 1972 are important to the case presented to us here, but two of these modifications are significant. When the first notice, entitled "Inflatable Occupant Restraint Systems," was published in 1969, the agency's emphasis was clearly on airbags. 34 Fed. Reg. at 11,148. In 1971, however, the agency observed that "some belt-based concepts have been advanced that appear to be capable of meeting the complete passive protection options," leading it to add a new section to the standard "to deal expressly with passive belts." 36 Fed. Reg. 12,858, 12,859 (July 8, 1971).

The second modification relevant here was the subject of a separate notice issued on the same day. For the first time, perhaps because passive seatbelts had expressly been added to the proposed standard, the agency suggested that passive restraint systems contain an "emergency release" mechanism to facilitate extrication of passengers following a crash. The agency cautioned, however, that the emergency release capability could not be allowed to nullify the advantages of the passive restraint system:

> In the case of passive belts, it would be required that the release not cause belt separation, and that the system be self-restoring after operation of the release. An example of such a system would be a lever on the belt retractor that releases the locking mechanism, allowing the belt to pay out freely. The self-restoration requirement could be fulfilled, for example, by a lever that frees the belt only while continuous pressure is exerted, or by a time-delay mechanism. In the case of an air bag system, deflation could constitute the "automatic" release.

36 Fed. Reg. 12,866 (July 8, 1971).

In its final form, the 1972 version of Standard 208 called for "complete passive protection" on vehicles man-

ufactured after August 15, 1975. In the interim, vehicles built between August 1973 and August 1975 were to carry either passive restraints, or lap and shoulder belts coupled with an "ignition interlock" that would prevent starting the vehicle if the belts were not connected. Most car makers chose the second option, and the ignition interlock was one of the factors that caused the 1972 rule to founder in both the courts and in Congress. In *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d 659 (6th Cir. 1972), the Sixth Circuit held that "the Agency's decision to require passive restraints is supported by substantial evidence," but that the testing procedures required of passive belts did not satisfy the Safety Act's requirement that standards be "objective." *Id.* at 675. The Sixth Circuit's decision did not affect ignition interlocks, but by late 1974 the public's irritation at being unable to start a car without fastening seatbelts led Congress to reject the entire standard. The Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (codified at 15 U.S.C. § 1410b) (hereinafter cited as the 1974 Amendments), effected two main changes. First, Congress banned any federal motor vehicle safety standard requiring ignition interlocks or continuous buzzers to warn that seatbelts were not in use. *Id.* § 1410b(b)(1).[4] Second, the 1974 Amendments sharply reduced DOT's discretion to modify Standard 208 in the future. If a modified standard could be satisfied by any system other than seatbelts only, the amended safety standard would have to be submitted to

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[4] 15 U.S.C. § 1410b(b)(1) states:

No Federal motor vehicle safety standard may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of, any continuous buzzer designed to indicate that safety belts are not in use, or any safety belt interlock system.

Congress where it might be vetoed by concurrent resolution of both houses. *Id.* § 1410b(b)(2).[5]

Predictably, the actions of the Sixth Circuit and Congress precipitated a new flurry of notices in the Federal Register. NHTSA proposed new warning systems to replace the prohibited continuous buzzers. *See, e.g.*, 39 Fed. Reg. 42,692 (Dec. 6, 1974). It postponed the effective date for passive restraint systems so as to comply with the mandate of Congress and the testing procedures required by the *Chrysler* decision. *See, e.g.*, 40 Fed. Reg. 16,217 (April 10, 1975). But most important, the agency had to comply with the congressional ban on ignition interlocks, and this had profound consequences for the case before us now. The 1974 Amendments were enacted on October 27, 1974. Nine months earlier, however, an agency rulemaking had reopened the question of emergency release mechanisms on passive seatbelts, 39 Fed. Reg. 3834 (Jan. 30, 1974), leading NHTSA to change its position of 1971 that these belts should not be detachable. In April 1974, NHTSA had adopted the suggestion of one automobile manufacturer that emergency release of passive belts be accomplished by a conventional latch—permitting belt separation—*provided the restraint system was guarded by an ignition interlock and warning buzzer to encourage reattachment of the passive belt.* 39 Fed.

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[5] 15 U.S.C. § 1410b(b)(2) states:

> Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may—
>
> (A) have the effect of requiring, or
>
> (B) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system other than a belt system.

Section 1410b(b)(3) exempts standards otherwise prohibited by this section if the standards are promulgated in accordance with the legislative veto provisions of 15 U.S.C. §§ 1410b(c) and (d). *See* pp. 34-36 *infra*.

Reg. 14,593 (April 25, 1974). The newly enacted amendments to the Safety Act obviously made this provision untenable. Rather than return to the regulation as it was proposed in 1971, however, the agency simply eliminated the ignition interlock and buzzer requirements. 39 Fed. Reg. 38,380 (Oct. 31, 1974). Passive belts still were required to have an emergency release mechanism in the form of a latch mechanism that caused release at a single point by pushbutton action.

Despite these modifications, NHTSA retained its interest in a standard calling for mandatory passive restraints. It postponed the effective date of the requirement to August 31, 1976, but emphasized that this postponement was only for a single year. "The NHTSA intends to propose the long-term requirements for occupant crash protection . . . as soon as possible." 40 Fed. Reg. 33,977 (Aug. 13, 1975). Shortly before that date, however, Secretary of Transportation William Coleman initiated a new rulemaking on the issue. 41 Fed. Reg. 24,070 (June 14, 1976). After hearing testimony and reviewing written comments, Coleman suspended the passive restraint requirement altogether. Although he found such restraints technologically and economically feasible, the Secretary based his decision on the expectation that there would be widespread public resistance to the new systems. Instead of a mandatory passive restraint standard, Coleman proposed a demonstration project involving up to 500,000 cars with passive restraints in order to smooth the way for such a standard at some later date. Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection* (December 6, 1976) (Coleman Decision), Joint Appendix (J.A.) 2065.

Coleman's successor as Secretary of Transportation, Brock Adams, reopened the passive restraint rulemaking only four months later. 42 Fed. Reg. 15,935 (March 24, 1977). Following another round of written comments

and a public hearing, Adams decided that the demonstration program was unnecessary. He issued a new mandatory passive restraint regulation, known here as Modified Standard 208. See 42 Fed. Reg. 34,289 (July 5, 1977). This regulation, covering eleven pages of the Code of Federal Regulations, 42 C.F.R. § 571.208 (1977), ordered a "phasing-in" of passive restraints based on vehicle size, beginning with large cars manufactured for the 1982 model year and extending to all cars manufactured for the 1984 model year and beyond.

Like its predecessor, the 1977 rule had to withstand testing in Congress and the courts. In *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979), this court upheld Modified Standard 208 as a rational, non-arbitrary regulation consistent with the agency's mandate under the Safety Act. Modified Standard 208 also fared well in Congress, which did not exercise its authority under the legislative veto provision of the 1974 Amendments. No action was taken by the full House of Representatives. The Senate committee with jurisdiction over NHTSA affirmatively endorsed the standard, S. REP. No. 481, 95th Cong., 1st Sess. (1977), and a resolution of disapproval was tabled by the Senate. 123 CONG. REC. 33,332 (1977).

Congress has plainly considered Modified Standard 208 politically controversial, however. Riders were attached to appropriation bills for 1979 and 1980 that prohibited DOT from implementing the passive restraint standard in those years. Pub. L. No. 95-335, § 317, 92 Stat. 435, 450 (1978); Pub. L. No. 96-131, § 317, 93 Stat. 1023, 1039 (1979). The passive restraint standard was not scheduled to be implemented until 1981, however, and these measures emphasized the need for experimentation and research. *See, e.g.*, H.R. CONF. REP. No. 1329, 95th Cong., 2d Sess. 14 (1978) ("The conferees intend that the language of this provision permits broad research and development activities related to the provisions of occu-

pant restraint standard No. 208"). Of far greater importance were congressional efforts in 1980 to modify rather than nullify the standard. *See, e.g.*, H.R. REP. No. 1371, 96th Cong., 2d Sess. (1980). These efforts, discussed in detail at pp. 39-47 *infra*, narrowly failed to become law, and Modified Standard 208 remained in effect.

Automobile manufacturers also reacted to Modified Standard 208. On May 22, 1978, NHTSA issued yet another notice of proposed rulemaking in response to a petition from General Motors (GM) concerning emergency release mechanisms on passive belts. GM sought reconsideration of the agency's 1974 decision to require latch mechanisms on passive belts.

> [V]ery little was known at the time of that decision regarding designs of passive belt systems. Further, automatic belt "defeat" rates were not a significant issue at that time since no mandate existed which would have required the use of passive restraints on all vehicles . . . . While this conclusion was fully justified at that time we do not believe it has the same degree of validity when applied to the mandatory incorporation of automatic restraint systems. As we noted previously maximum usage will be a major concern beginning with the effective dates of the mandate established in June 1977; thus necessitating additional consideration for designs which show promise in helping to ensure that vehicle occupants avail themselves of the inherent safety benefits of automatic belt restraints.

43 Fed. Reg. 21,912, 21,914 (May 22, 1978) (quoting GM proposal). Specifically, GM sought authority to use a "spool release" mechanism that would allow emergency exit from vehicles without requiring separation of the belt. NHTSA noted its "interest" in "the anticipated rate of installation of passive belts and in any passive belt designs that would seek to minimize the rate of dis-

connection." *Id.* at 21,913. It granted GM's proposal six months later, although in a broader form so as to permit even greater experimentation with emergency release designs. 43 Fed. Reg. 52,493 (Nov. 13, 1978). Automobile makers began gearing up to comply with the safety regulation; by October 1981, they had expended a substantial portion of $550 million capital investment necessary to produce the required equipment.[6]

In February 1981, approximately one month after taking office, Secretary of Transportation Andrew Lewis reopened the rulemaking yet again. 46 Fed. Reg. 12,033 (Feb. 12, 1981). He based his decision at least in part on "the fact that economic circumstances have changed since the standard was adopted in 1977" and the "difficulties of the automobile industry," citing high unemployment, sales "at a very depressed level," and losses "by even the largest of the domestic manufacturers." *Id.* Two months later, the agency ordered a one-year delay in the application of the standard to large cars, extending the deadline to September 1982. 46 Fed. Reg. 21, 172 (April 9, 1981). This notice also observed that the "economic situation of the industry and consumers and the economy as a whole have drastically changed since the standard was adopted in 1977." *Id.* at 21,174. On the same day, NHTSA proposed the possible rescission of the entire standard. 46 Fed. Reg. 21,205 (April 9, 1981). Both decisions were announced by the White House Press Office on April 6, 1981, as a part of a larger package of economic recovery measures. *See Actions to Help the U.S. Auto Industry* at A-34 (April 6, 1981), J.A. 1281, 1321. After receiving written comments and holding public hearings, NHTSA issued a final rule (Notice 25) that rescinded the passive restraint require-

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[6] *NHTSA Final Regulatory Impact Analysis, Rescission of Automatic Occupant Protection Requirements* (October 1981) (hereinafter cited as RIA), at VI-41, J.A. 203 (35% of manufacturers' budgeted capital for automatic restraints has already been spent).

ment, and amended Standard 208 to eliminate this requirement. 46 Fed. Reg. 53,419 (Oct. 29, 1981) (Notice 25). This court denied motions to stay the rescission in December 1981, and these petitions for review followed.

B. *NHTSA's Analysis in Notice 25*

The issues raised by Notice 25 are best introduced by a general discussion of the safety problem and the regulatory task faced by the agency. The starting point for both NHTSA and the petitioners in this action is the fact, based on survey data and accident reports, that American motorists overwhelmingly fail to use their seatbelts. The usage rate of seatbelts is not only low, but falling. In 1977, DOT estimated that usage of manual seatbelts was around 20%. 42 Fed. Reg. at 34,290. Today, NHTSA estimates that nationwide usage has fallen to 11%. 46 Fed. Reg. at 53,422.[7]

Although individuals must decide whether to wear a seatbelt, NHTSA and Congress have recognized that seatbelt usage has serious social consequences. It has been estimated that one American dies in a traffic accident every 11 minutes. S. REP. NO. 481, 95th Cong., 1st Sess. 2-3 (1977). NHTSA predicts that there will be 61,710 motor vehicle fatalities in 1984, and that "because of the growing number of small cars, passenger car occupant deaths could increase by as much as 7,000 by 1990." *NHTSA Final Regulatory Impact Analysis, Rescission of Automatic Occupant Protection Requirements* (October 1981) (hereinafter cited as RIA), at V-12 n.4, XI-3, J.A. 160 n.4, 263. A significant number of these deaths —and an even larger number of serious injuries—could be prevented if motorists wore seatbelts. The resulting

[7] The usage figures vary by car size, RIA at IV-20, J.A. 76 (17% subcompact, 10% compact, 8.5% intermediate, 7.9% full-size), and apparently by region of the country, *id.* at IV-31, J.A. 87 (survey showing difference of 25 percentage points between usage in Maryland and North Carolina).

benefits to society include reduced insurance premiums, lower medical and rehabilitative costs, and incalculable savings in terms of human tragedy. Estimating the value of these benefits is necessarily inexact, but estimates can be made. In 1977, for example, DOT predicted that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed. Reg. at 34,298. In Notice 25, NHTSA estimated that if the usage rate of seatbelts rose from 11% to 60%, Modified Standard 208 would save 8,750 lives and 176,900 serious injuries each year. RIA at IV-71, J.A. 127. The agency estimates the long-term savings in various kinds of insurance premiums alone at $4.3 billion annually, if these fatalities and deaths could be avoided. *Id.* at V-14, J.A. 162.[8]

Investment in safety also has its costs, of course. In 1977, for example, Secretary Adams estimated that passive seatbelts would exceed the cost of manual seatbelts by $25 per car, and that installation of airbags would cost $112 per vehicle. 42 Fed. Reg. at 34,293. These

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[8] The RIA discussed automobile, health, and life insurance plans. It predicted automobile insurance reductions of $960 million to $2.9 billion annually, from the low to the high ends of the range. RIA at V-7, J.A. 155. The range of reductions in health insurance, government payments, and workers' compensation was $451 million to $1.4 billion annually. RIA at V-11, J.A. 159. Similarly, the annual reductions in automobile fatalities would save $6 to $26 million in life insurance annually. RIA at V-12, J.A. 160. These savings can also be expressed on a per-car basis, suggesting a present discounted value of $79 to $240 per car (using a 10% discount rate). RIA at V-14, J.A. 162. Such analysis is extremely sensitive to assumptions about the appropriate discount rate, of course. *See* RIA at A-5, J.A. 279 (change from 10% discount rate to 7% discount rate increases social benefits by 46%). The analysis also understates the expected savings because it deals only with reductions in insurance premiums, and makes no attempt to calculate the full social cost of traffic fatalities and injuries in such terms as lost earnings and reduced productivity. *See* RIA at A-4, J.A. 278 (estimating social cost of serious injuries at $15,140 and of fatalities at $314,100, assuming 10% discount rate).

costs have risen with inflation. In 1981, NHTSA estimated that the marginal cost of passive restraints would vary between $50 and $150 per vehicle. The average figure was $89, which includes $15 for added fuel costs over the life of the car. 46 Fed. Reg. at 53,423; RIA at VI-40, J.A. 202.[9] The cost of airbags has also risen sharply and depends to a great extent on the volume of production. If all vehicles manufactured annually were equipped with airbags, the resulting economies of scale would hold airbag costs to between $200 and $330 per car. At lower volumes, however, such as only 10,000 units a year, the cost of airbags could climb as high as $1,200 per vehicle. RIA at VI-10, J.A. 172. NHTSA

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[9] *See generally* RIA at VI-40 to VI-48, J.A. 202-210. Costs of equipment in the early years of the regulation's implementation would be higher, but would decline in the long run as restraint systems were incorporated in new vehicle designs as opposed to retrofitting existing vehicle designs. RIA at VI-42, J.A. 204.

NHTSA responded in several ways to criticism that it "has not adequately explained how the costs of automatic belts have more than doubled in constant dollars since 1977," when Secretary Adams estimated the marginal cost of passive belts to be $25. It stated that the earlier figure was based on the Volkswagen (VW) Rabbit system, which is not representative of larger cars. RIA at B-3, J.A. 287; *see id.* at VI-6, J.A. 168 (1981 retail price of VW Rabbit belts was $50, and 1981 retail price of GM Chevette belts was $65). Moreover, NHTSA's overall estimate of belt prices includes the cost of features that would not be required by the standard but that might increase consumer acceptance of passive belts. *See, e.g., id.* at VI-5, VI-36, J.A. 167, 198 (estimate includes cost of "luxurious" Toyota system, in which electric motor moves belt out of the way when door opens, at cost in excess of $300). The cost estimate even includes equipment that NHTSA is prohibited from requiring. *See id.* at VI-37, J.A. 199 (although VW Rabbit's interlock "adds an estimated $12 to the retail cost, we believe that this feature increases use and that its cost is properly attributable to the standard"). As NHTSA observed, "[i]t can be argued that fancy consoles, easy stowage, and retractor/reel features are not required for compliance, and therefore, should not be included as 'legitimate' standard-costs. Since usage is a function of consumer acceptance, it is difficult to draw a line." RIA at VI-40, J.A. 202.

estimated the cost of Modified Standard 208 to be approximately $1 billion per year. 46 Fed. Reg. at 53,423; RIA at VI-49, J.A. 211.

The regulatory problem facing NHTSA was therefore simple in theory, although extremely difficult in application. It had to predict the savings that would result from Modified Standard 208, and compare that savings with the cost of the standard, so as to conduct "a 'commonsense' balancing of safety benefits and economic costs." *United States v. General Motors Corp.*, 518 F.2d 420, 435 (D.C. Cir. 1975); *see H & H Tire Co. v. Dep't of Transportation*, 471 F.2d 350, 353-54 (7th Cir. 1972).[10] NHTSA found that the costs of the passive restraints required by Modified Standard 208 could be justified only if nationwide seatbelt usage rose by 13 percentage points, from 11% to 24%. RIA at A-10, J.A. 284. NHTSA concluded that no such increase would occur, and therefore rescinded the standard.

1. *Modified Standard 208 as written*

As discussed above, Modified Standard 208 as it stood in 1981 could have been satisfied by airbags or by either of two kinds of passive seatbelts. Both the "continuous" and the "detachable" passive seatbelts provide the emergency release mechanism required by the standard. On continuous belts, this mechanism may consist of a "spool-out" device that expands the belt but does not detach

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[10] *See* note 3 *supra*. NHTSA cautioned, however, that

> the conversion of safety benefits (i.e., lives saved and injuries avoided) into dollar figures is an improper and inappropriate method of reaching decisions on safety issues. [NHTSA should not be] charged with placing a dollar value on human life. Such a concept is offensive and the Agency has not been performing such calculations. . . . [W]hile costs and benefits must both be considered, safety is of overriding concern. Thus, regardless of the outcome of a dollar-based benefit-cost analysis, it cannot be used as the sole criterion for decisionmaking.

RIA at A-1, A-2, J.A. 275, 276.

it. On detachable belts, the mechanism allows separation of the belt in the same way that manual seatbelts are buckled and unbuckled.

In Notice 25, NHTSA first found it "reasonably certain" that if Modified Standard 208 were implemented, "the overwhelming majority of new cars would be equipped with automatic belts that are detachable." 46 Fed. Reg. at 53,421. Sixteen automobile manufacturers had participated in the rulemaking. Two stated that they planned to use the detachable belts; three said they expected to do so, although they did not make a definite commitment; five predicted that the automotive industry as a whole would rely on detachable belts, without discussing their own design plans at all; and the remaining six were silent on the question.[11]

NHTSA then analyzed the efficacy of the detachable passive seatbelt. Passive seatbelts—both detachable and continuous—have been in use for some years, and the record shows that these devices increase seatbelt use on every model.[12] NHTSA observed, however, that the data

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[11] GM and Chrysler were the only two car makers that explicitly stated an intention to use detachable passive belts. See J.A. 1220, 2549 (rulemaking comments). NAII challenges the interpretation given by NHTSA to the comments of other manufacturers on this point, NAII Brief at 23-24 (12 of the 16 manufacturers "gave no indication one way or another as to their plans for detachability features"), and State Farm suggests that "the record is not a model of clarity on this point." State Farm Brief at 40 n.51. Petitioners also contend that NHTSA committed procedural error in holding "secret meetings" with several manufacturers to obtain "a detailed breakdown of their planned automatic belt designs" after the public comment period closed. NAII Brief at 24 n.14; State Farm Brief at 40 n.51.

[12] Between 1975 and 1980, Volkswagen (VW) sold approximately 350,000 Rabbits equipped with detachable passive seatbelts that were guarded by an ignition interlock. General Motors (GM) sold 8,000 1978 and 1979 Chevettes with a similar system, but eliminated the ignition interlock on the 13,000 Chevettes sold in 1980. The 1980 Chevettes offered a lap/shoulder belt whose lap portion could

could be interpreted in greatly different ways.[13] It also questioned, for a number of reasons, whether the data could be used to predict overall usage rates under Modi-

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be detached from the socket on the car door. Finally, Toyota has offered a "spool release" continuous belt on some 1980 Coronas and on all 1981 Cressidas.

Although design features can increase the use of passenger restraints, no system yet conceived appears capable of bringing the usage rate anywhere near 100%. Even the ignition interlock required on cars between 1973 and 1975—arguably the most coercive belt system imaginable—succeeded in increasing belt usage only to roughly 60% in 1974. Consumers deactivated many of these devices and seatbelt use in those cars quickly fell to around 40%. *See Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1341 n.14.

Nevertheless, the passive belts thus far in use have shown striking results. Based on a variety of sources, NHTSA found that belt usage in the VW Rabbits averaged 34% for manual belts and 84% for passive belts. RIA at IV-52, J.A. 108. For the 1978-1979 Chevettes, NHTSA used figures of 34% for manual belts and 71% for passive belts. On 1980 Chevettes, the agency found these figures to be 31% for manual belts and 70% for passive belts. *Id.*, J.A. 108. No statistically valid data for the Toyota models appears on the record, although there is no suggestion that it would vary greatly from the other models. *See id.* at IV-29, J.A. 85 (based on 8 observations, 17% use of manual belts and 88% use of automatic belts).

[13] 46 Fed. Reg. at 53,422. The problem is predicting the effect of the automatic belts on the general population, where the average use is 11%, from data concerning vehicles on which even manual usage is at a much higher rate. One set of VW data, for example, suggested usage rates of 36% for manual belts and 81% for automatic belts. The difference made by passive belts could be interpreted either as showing an arithmetic increase of 45 percentage points, or as showing a multiplier effect of 2.3 times. Depending on whether the "additive" or the "multiplier" technique is used, nationwide rates could be predicted to increase to 56% or 25% respectively. NHTSA "used the results of these two techniques in an attempt to construct a range of possible increases in belt usage," and concluded that extrapolation from the raw data suggested "a range of 15 to 60 percent" could result. 46 Fed. Reg. at 53,422. *But see* RIA at IV-29, J.A. 85 (Opinion Research Corporation sample

fied Standard 208.[14] Finally, NHTSA analyzed the operation of the detachable belts, and found them functionally equivalent to manual seatbelts already in use.

> Most planned automatic belts would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently . . . . Some belt designs may be detached and permanently stowed as readily as the current manual lap and shoulder belts. Once a detachable automatic belt is detached, it becomes identical to a manual belt. Contrary to assertions of some supporters of the standard, its use thereafter requires the same type of

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found 89.8% use of VW automatic belts, more than 63 percentage points higher than use of VW manual belts, in early 1981). Although NHTSA next argued that the lower end of this range was too high, it could therefore be suggested that the upper end of this range was too low.

[14] The agency noted four factors that it said made it impossible to generalize from the data on VW Rabbits and GM Chevettes to the general vehicle fleet. (1) *Car size.* Both the Rabbit and Chevette are subcompacts, and belt usage rates are typically higher in small cars than in large ones. *See* note 7 *supra.* (2) *Owner demographics.* Belt usage increases with educational level and income, RIA at IV-27, J.A. 83, and "Rabbit owners typically have higher education levels and earn more money" than the average car owner. *Id.* at IV-33, J.A. 89. (3) *Voluntarism.* "Having voluntarily invested in automatic restraints, [these users] are more likely to use those restraints than someone who is compelled to buy them." 46 Fed. Reg. at 53,421. (4) *Coercive use features.* The Rabbits and the 1978 and 1979 Chevettes were equipped with interlocks. NHTSA also described the belt system on 1980 Chevettes as "coercive," even though that model did not have an interlock, because the shoulder portion of the lap/shoulder belt was continuous. *Id.; see* note 12 *supra.* The last factor was considered the most important one. NHTSA concluded that the Rabbit interlock "would account for four-fifths of the [usage] increase observed in the automatic belt vehicles," and attributed a "significant portion of the remaining increase" to the fact that Rabbit and Chevette owners "knowingly and voluntarily bought the automatic belts. . . . This factor would not, of course, be present in the fleet subject to the standard." 46 Fed. Reg. at 53,422. *But see* note 30 *infra.*

> affirmative action that is the stumbling block to obtaining high usage levels of manual belts.

46 Fed. Reg. at 53,421.

NHTSA's final step was to predict the usage rate of detachable passive belts that could be expected under the standard. Although Notice 25 is somewhat unclear as to the precise finding, NHTSA clearly believed that any increase in usage would be minimal. The agency

> cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase. The adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts. Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 or 10 percentage point increase.

46 Fed. Reg. at 53,423. NHTSA cautioned that "the agency is not able to agree with the assertions that there will be absolutely no increase in belt use as a result of automatic belts," *id.* at 53,425, but it repeatedly emphasized that any increase would be "extremely small due to the substantial similarity of the design and methods of using detachable automatic belts and manual belts" and that "detachable automatic belts may contribute little to achieving higher belt usage rates." *Id.* at 53,423.

Based on these three steps, NHTSA concluded that the savings from increased seatbelt usage under Modified Standard 208, if any, would not exceed the costs of the regulation:

> In view of the possibly minimal safety benefits and substantial costs of implementing the automatic re-

> straint requirements, the agency is unable to conclude that the incremental costs of the requirements are reasonable. The requirements are, in that respect, impracticable.

46 Fed. Reg. at 53,423. It therefore concluded that the standard should either be revised or rescinded.

2. *Modified Standard 208 as NHTSA considered revising it*

NHTSA recognized that its analysis of detachable passive belts did not apply to other kinds of passive restraints. "[T]he question then arises whether the agency should amend the standard to require that automatic belts have a use-inducing feature"—*i.e.*, be continuous rather than detachable—that "would increase belt usage." 46 Fed. Reg. at 53,423. The agency rejected a refinement of the standard as "impracticable," however, for reasons of cost, equity, public reception, and safety.

Of these factors, only the last two received emphasis in Notice. 25.[15] NHTSA's first reason for not amending Modified Standard 208 to require "use-compelling fea-

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[15] The portion of NHTSA's decision explaining why it had decided against amending the standard takes up only a third of one page in its nine-page opinion. 46 Fed. Reg. at 53,424. Earlier in the decision, NHTSA foreshadowed the issue in recognizing that "the question then arises whether the agency should amend the standard . . . ." *Id.* at 53,423. The next three columns of the Federal Register appear to discuss only detachable belts, however. *E.g.*, *id.* (standard would cost too much because of uncertainty that "owners of cars with detachable automatic belts would receive offsetting discounts in insurance costs"); *id.* at 53,424 (negative effect on public attitude toward safety regulation because "detachable automatic belts may not be any more acceptable to the public than manual belts"); *id.* (standard would be inequitable because "the current regular user of manual belts" would be required "not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints"). *But see* notes 33, 43 *infra*.

tures" on passive belts drew on the negative earlier reaction to ignition interlocks. "The history of the Congressional action which removed this authority from NHTSA suggests that Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt system." *Id.* at 53,424. Second, NHTSA concluded that revising the standard to require only continuous belts would be "counterproductive" because of "irrational" reactions by users:

> Recent attitudinal research conducted by NHTSA confirms a widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash. Such apprehensions may well be contributing factors in decisions by many people not to wear a seat belt at all. . . . [I]t would be highly inappropriate to impose a technology which by its very nature could heighten or trigger that concern.

Id. Finally, NHTSA suggested that this concern might not be so "irrational" after all. It suggested that "there are compelling safety reasons" why continuous belts—even those with emergency release features—should not be mandated.

> In the event of accident, occupants wearing belts suffer significantly reduced risk of loss of consciousness, and are commonly able to extricate themselves with relative ease. However, the agency would be unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would.

Id.

Although these three reasons exhaust NHTSA's explicit discussion of its refusal to modify the passive restraint standard, it seems clear that the agency also relied on a fourth concern, albeit one stated only in the

context of detachable belts. Much of Notice 25 focuses on concern about public attitudes toward government safety regulations, suggesting that a backlash against a passive restraint standard "might cause significant long run harm to the safety program." *Id.* at 53,424. Because detachable passive belts and manual belts may be perceived as functionally identical, "it is not unreasonable to conclude that the public may regard the automatic restraint requirements as an expensive example of ineffective regulation." *Id.* Adverse public reaction might lead some car owners to "cut the automatic belts out of their cars, thus depriving subsequent owners of the cars of the protection of any occupant restraint system," and could bring "a poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future." *Id.* "A public that believes it is the victim of too much government regulation by virtue of the standard might well resist such parallel efforts [advertising campaigns and educational programs] to enhance voluntary belt usage." *Id.* at 53,425-26.[16]

II. The Scope of Review

Our review in this case proceeds under both the substantive sections of the Safety Act and the provision for judicial review of informal rulemaking in the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1976). Section 103(b) of the Safety Act, 15 U.S.C. § 1392(b), states that the APA "shall apply to all orders establishing, amending, or revoking a Federal motor vehicle

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[16] NHTSA's final point in Notice 25 was that it planned to "undertake a major educational effort to enhance voluntary belt usage," and that such an educational effort would be "at least as effective but much less costly than the installation of millions of detachable belts." 46 Fed. Reg. at 53,424-25. The agency promised to undertake this effort "entirely apart from the pending proceeding," but noted that "this effort will predominantly affect the same population that the automatic belts would be aimed at." *Id.* at 53,425.

safety standard." The 1974 Amendments further specify that "[s]ection 553 of title 5 [the APA] shall apply" to occupant crash protection standards promulgated under the congressional review procedures. 15 U.S.C. 1410b(c)(2). As a result, the standard of review appears easily formulated. It is well established that the familiar "arbitrary and capricious" test applies to informal rulemaking conducted pursuant to section 553 of the APA. *See, e.g., Camp v. Pitts*, 411 U.S. 138 (1973); *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1343.

The appropriate scope of judicial review remains the most troublesome question in this case, however, because we are called upon to review the rescission rather than the promulgation of an agency rule. The scope of review in such a situation appears to be a matter of first impression, even though judicial review of orders revoking a standard is specifically authorized by the Safety Act and the APA. The appropriate scope of our review is also a question of some complexity. At first view, rescission more resembles agency refusal to act than an agency decision to act, and the distinction has significance for the degree of judicial deference paid to the agency. As we recently noted in *WWHT, Inc. v. FCC*, 656 F.2d 807, 818-19 (D.C. Cir. 1981), it is only in the rarest and most compelling circumstances that courts overturn an agency's "'expert' determination not to pursue a particular program or policy at a given time." Although the *WWHT* court held that an agency's denial of a petition for rulemaking was subject to judicial review, the opinion emphasized that "the scope of review of such a determination must, of necessity, be very narrow." *Id.* at 809. In *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979), the court reached a similar conclusion in reviewing a situation in which the agency terminated a rulemaking proceeding without issuing a rule:

> As is typical in informal rulemaking cases under section 4 of the APA, 5 U.S.C. § 553, many of the issues raised here are within the province of agency expertise and do not readily lend themselves to judicial oversight. . . . [O]ur review of the Commission's factual, and particularly its policy, determinations will perforce be a narrow one . . . .

Id. at 1052-53. These cases may be distinguished, of course, from the one before us. NHTSA has not denied a petition for rulemaking, or failed to issue a rule after a proceeding, but has rescinded a rule that has already been promulgated. Even so, the parallels are obvious, and dictate caution in formulating the appropriate scope of review here.

In recent years, however, courts have increasingly emphasized that the "arbitrary and capricious" standard encompasses intensive as well as deferential judicial scrutiny, depending in part on "the nature of the particular problem faced by the agency." *Natural Resources Defense Council*, 606 F.2d at 1050. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1972), the Supreme Court interpreted the arbitrary and capricious test to require a "substantial inquiry" subjecting the agency's action to "a thorough, probing, in-depth review."[17] The prior adjudications under the

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[17] In *City of Chicago v. FPC*, 458 F.2d 731, 742-45 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972), this court followed *Overton Park* in explaining why judicial review of informal rulemaking must be "searching and careful," notwithstanding the "quasi-legislative" nature of such rulemaking. *See* generally Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Note, *Judicial Review of the Facts in Informal Rulemaking*, 84 YALE L.J. 1750 (1975). For possible explanations of the increasingly careful judicial review of informal rulemaking, see DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 278-84 (1979) (suggesting that "presumption of reasoned neutrality" once given to agency action has been eroded by "the capture of regulatory agencies by special interests" and by

Safety Act concerning Standard 208 also illustrate that this review may be searching as well as deferential. Each decision reviewed NHTSA's issuance of the passive restraint standard for whether it was supported by "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E), even though in each instance the agency had promulgated the standard after informal rulemaking. In *Chrysler Corp. v. Dep't of Transportation*, the Sixth Circuit concluded that the substantial evidence test was required by the Safety Act, which mandates that "all of the evidence before the agency . . . shall be included in the record" submitted to the reviewing court. 15 U.S.C. § 1394(a)(1) (referring to 28 U.S.C. § 2112(b)). 472 F.2d at 668.[18] In *Pacific Legal Foundation v. Dep't of Transportation*, the court conducted a "thorough, probing, in-depth review" of the record, but declined to follow the Sixth Circuit's invocation of the substantial evidence test because any difference was "largely semantic":

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congressional creation of "the single-value agency"); Gellhorn & Robinson, *Rulemaking "Due Process,"* 48 U. CHI. L. REV. 201, 202 (1981) (agency power to employ informal rulemaking procedures was not confirmed until 1956, and format was still relatively little used for the next fifteen years).

[18] In *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1343 n.35, this court noted that the case for this approach was strengthened by the 1974 Amendments, which required that a public hearing be held on any proposed passive restraint standard. 15 U.S.C. § 1410b(c)(2). *But see* 120 CONG. REC. 35,636 (1974) (Representative Staggers) (under 1974 Amendments, DOT "would not be required to provide an adjudicatory hearing under sections 556 and 557 of title 5, United States Code; and judicial review of a standard promulgated under the section 125(c) procedure would not be under the 'substantial evidence' rule—since the agency hearing is not required to be 'on the record' "); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 336-37 (D.C. Cir. 1968) (rejecting argument that "record" meant "evidentiary record," and refusing to infer that Congress "in this unnecessarily oblique way" intended to subject agency's informal rulemaking to substantial evidence test).

> We do not follow this reasoning because we agree with the emerging consensus of the Courts of Appeals that the distinction between the arbitrary and capricious standard and substantial evidence review is largely semantic, and that "in the review of rules of general applicability made after notice and comment rulemaking, the two criteria do tend to converge." *Associated Industries of New York State, Inc. v. Dep't of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) . . . . [W]e agree with Judge Lumbard that "when an agency engages in substantive rulemaking, it abuses its discretion (or acts arbitrarily and capriciously) if its actions are not supported by substantial evidence." *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 705 (2d Cir. 1975) (Lumbard, J., concurring in the result).

593 F.2d at 1343 n.35. *See Recording Industry Ass'n v. Copyright Royalty Tribunal*, No. 80-2545, slip op. at 15-16 (D.C. Cir. Aug. 27, 1981); *Sierra Club v. Costle*, 657 F.2d 298, 323 n.67 (D.C. Cir. 1981); *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 636 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1029 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1006 (1st Cir. 1973).

In short, although all parties in this case agree that we should apply the arbitrary and capricious standard of review, they differ markedly about the intensity and rigor with which that standard should be applied. NAII contends that there is a "heavy burden" on NHTSA to explain that its rescission is "rational and supported by substantial evidence." Brief for Petitioner NAII (NAII Brief) at 19. State Farm urges that our review be "intensive and exacting," Brief for Petitioner State Farm (State Farm Brief) at 21. Although NHTSA "welcomes the most intense scrutiny" and contends that Notice 25 is "supported by the evidence in the record," Brief for

Respondent NHTSA (NHTSA Brief) at 19, the agency also urges that we exercise "a high degree of deference to the agency's determination." *Id.* at 24 (quoting *Natural Resources Defense Council*, 606 F.2d at 1050).

Before we decide this question, it may be useful to ask why the same verbal standard of review should be given different scope in different contexts. Part of the answer was suggested in *Pacific Legal Foundation v. Dep't of Transportation*, where the court explained that its "probing" review was required by the fact that Secretary Adams' decision to issue the 1977 rule (Modified Standard 208) had come on the heels of Secretary Coleman's decision four months earlier that such a standard was not required:

> In addition, because the order under review here reversed a prior policy, the agency must provide "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law."

593 F.2d at 1343-44 (quoting *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)). As Judge Leventhal observed over a decade ago, sharp changes of agency course constitute "danger signals" to which a reviewing court must be alert. *Joseph v. FCC*, 404 F.2d 207, 212 (D.C. Cir. 1968). He elaborated in a later case:

> Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the Commission's policies are in flux. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . .

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971). *See RKO General, Inc. v. FCC*, 670 F.2d 215, 223-24 (D.C. Cir. 1981); *Local 177, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978) (agency must announce "principled reason" for reversal of policy).

The difficulty with these observations is that they blend judicial review of agency adjudications and licensing with review of agency rulemaking. Intuitively, at least, it seems obvious that concern for consistency in an agency's decisionmaking should be greatest when the agency departs from an adjudicative precedent or a well established licensing rule, and less grave when the agency reconsiders the value of a "quasi-legislative" rule of general applicability. Precedents by definition must be the basis for future reliance, and a sudden agency departure suggests that parties may have been treated unfairly. *See, e.g., Boston Edison Co. v. FPC*, 557 F.2d 845, 849 (D.C. Cir.), *cert. denied sub nom. Towns of Norwood, et al. v. Boston Edison Co.*, 434 U.S. 956 (1977) (should agency decide to reverse its course, it must give notice "and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect"). In contrast, even the eleventh-hour decision not to promulgate a regulation has less impact on regulated parties. This may explain why rulemaking proceedings that terminate short of agency actions, *e.g., Natural Resources Defense Council v. SEC*, 606 F.2d 1031, and agency decisions not to conduct rulemaking proceedings at all, *e.g., WWHT, Inc. v. FCC*, 656 F.2d 807, are tested under a "very narrow" reading of the arbitrary and capricious test. The agency's refusal to act may reflect its desire to use scarce resources on more pressing problems, or its judgment that a problem is trivial or nonexistent. *See Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958). Agency departure from

precedent raises obvious problems, but why should courts have similar concerns about erratic agency policymaking or reversals in the course of rulemaking?

The answer to this question lies in the fact that an agency is not a legislature.[19] Congress delegates rulemaking power in the anticipation that agencies will perform particular tasks. Reviewing courts are required to strike down agency action that exceed this mandate. *See, e.g.*, 5 U.S.C. § 706(2)(C). Even when there is no claim that the agency has exceeded its jurisdiction, as there is not in this case, sudden and profound alterations in an agency's policy constitute "danger signals" that the will of Congress is being ignored. The few cases in which agency decisions not to institute rulemaking have been overturned, for example, primarily involve plain errors of law, suggesting that the agency has been blind to the source of its delegated power. *See, e.g., NAACP v. FPC*, 520 F.2d 432 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976) (Commission erred in concluding that it lacked jurisdiction to promulgate regulations concerning racial discrimination by licensees); *NORML v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974) (bureau erred in rejecting filing of petition for rulemaking for reasons going to the merits). *Cf. Los Angeles Women's Coalition v. FCC*, 584 F.2d 1089 (D.C. Cir. 1978) (per curiam) (remanding Commission's denial of hearing on petition to deny license for further development of factual issues). In

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[19] Indeed, the evolution of "arbitrary and capricious" review, *see* note 17 *supra*, may partially be explained by increasing judicial sensitivity to this fact. *See, e.g., Superior Oil Co. v. FPC*, 322 F.2d 601, 619 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964); *Flying Tiger Line, Inc. v. Boyd*, 244 F.Supp. 889, 892 (D.D.C. 1965) (informal rulemaking proceedings "are analogous to hearings conducted by Congressional Committees"); *cf. Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) ("the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies").

Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979) (per curiam), the court reversed the agency's "plainly misguided" refusal to consider the possible effect of newly enacted copyright legislation on its earlier regulations. As we recently described the *Geller* rule, "an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed." *WWHT, Inc. v. FCC*, 656 F.2d at 819. This articulates in specific terms the general principle that administrative agencies derive their power from the laws of Congress and have no authority to act inconsistently with their statutory mandate. The same tenet may be identified in adjudications under 5 U.S.C. § 706(1) to "compel agency action unlawfully withheld or unreasonably delayed."

In determining the scrutiny with which the arbitrary and capricious standard should be applied to NHTSA's rescission of Modified Standard 208, then, we must first consider the extent to which NHTSA's action may be inconsistent with the congressional purpose behind the Safety Act. It may seem unusual to discuss this legislative history before a precise standard of judicial review has been formulated, but in this case there is no better way to undertake such a task.

A. *Standard 208 in Congress*

Our review of the legislative history of the 1974 Amendments to the Safety Act and the subsequent congressional reaction to Modified Standard 208 suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so. Although Congress has always considered the standard politically controversial, the regulation has received sufficient congressional approval to raise doubts that NHTSA's rescission necessarily demonstrates an effort to fulfill its

statutory mandate. Three separate periods of the standard's history in Congress merit close attention. The first is late 1974, when Congress banned the ignition interlock and continuous buzzer but did not foreclose NHTSA's pursuit of a passive restraint standard. The second period is late 1977, when NHTSA submitted Modified Standard 208 to both houses of Congress in accordance with the legislative veto provisions of 15 U.S.C. § 1410b, but concurrent resolutions of disapproval were not enacted. The final period is early 1980, when Congress contemplated new amendments to the Safety Act that would have refined Modified Standard 208 but would not have abolished it.

1. *Passive restraints in 1974*

In 1974, Standard 208 had not yet been modified by Secretary Adams. It called for the mandatory installation of passive restraints by August 15, 1976, and provided that during the preceding two-year period automobiles either should have passive restraints, or should be equipped with an ignition interlock and continuous buzzer to encourage use of manual seatbelts. As noted above, *see* p. 9 *supra*, the public reaction to the interlock and continuous buzzer was swift and furious, and a chief purpose of the 1974 Amendments was to ban them. Congress could not help knowing about the pending date for mandatory passive restraints, however, and the instructive aspect of the 1974 period is that Congress encouraged NHTSA to proceed with such a standard under carefully constructed legislative conditions.

The 1973 Senate bill for NHTSA authorizations contained no provision dealing with the passive restraint standard. *But see* 119 CONG. REC. 16,054 (1973) (Senator Magnuson) (noting that airbags "have proven to be both reliable and life saving," and proposing $3 million authorization "to equip General Services Administration vehicles with airbag systems"). In the House, however,

opponents of the ignition interlock broadened their criticism to include passive restraints as well. Representative Wyman, who later described himself as "the prime sponsor of the interlock prohibition," 120 CONG. REC. 35,637 (1974), proposed a broad amendment to the Safety Act that would have made it impossible for NHTSA ever to promulgate a standard requiring mandatory passive restraints. *Id.* at 27,822. Representative Moss proposed to amend this amendment so as not to affect the "pending regulation, which already has been published, on which comment has been received, for the passive restraint system to become effective" as planned. *Id.* But Representative Wyman insisted on his version, arguing that passive restraints should be available only as options, and the Wyman amendment passed overwhelmingly. *Id.* at 27,822-23.

When the House and Senate bills went to conference, however, the Wyman amendment was discarded. Instead, the conference version proposed:

> No occupant restraint system other than a belt system could become effective until Congress was given an opportunity to consider such standard for sixty days of continuous session (except that DOT could permit a manufacturer (at his option) to comply with a standard with a nonbelt system instead of a belt system).

H.R. CONF. REP. NO. 1452, 93d Cong., 2d Sess. 45 (1974). The Senate approved the report without a recorded vote, 120 CONG. REC. 35,037 (1974), but most relevant comments were favorable. Senator Magnuson suggested that

> exciting new technology on the immediate horizon . . . will save more lives than all of the other [motor vehicle] standards heretofore promulgated put together. . . . Congress has vested the Department with all of the authority it needs to get the job done. The burden is now with the Department to move

> forward with a sense of urgency. The problem is urgent.

Id. at 35,036; *see id.* (statement of Senator Hartke) (noting high benefit-cost ratios of passive restraint systems). The House also approved the conference report without a recorded vote, *id.* at 35,637, with Representative Wyman also urging its adoption, *id.*

As the 1974 Amendments were interpreted by members of Congress, NHTSA was required to follow four main steps before a "nonbelt" safety standard could be promulgated.[20] Representative Staggers, chairman of the House Committee on Interstate and Foreign Commerce with jurisdiction over the legislation, explained that the 1974 Amendments required (1) a modification in DOT's notice and comment requirements in order "to permit interested persons to present oral presentation"; (2) specific provision for "input" by members of Congress; (3) transmittal of any proposed standard to Congress; and (4) application of the legislative veto provisions of 15 U.S.C. § 1410b. *See* 120 CONG. REC. 35,636 (1974). With these conditions, the way was clear for NHTSA to try again. Congress obviously anticipated that a test of the passive restraint standard would come when a revised standard was sent to it on a later date. NHTSA complied

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[20] In presenting the Conference Report to the House, Representative Staggers emphasized that a "nonbelt" standard included standards that could be met by seatbelts *if they could also be met by nonbelts*. The legislative veto provisions affect "not only a standard which by its terms requires the system but also a performance standard which as a practical matter can only be met by use of that system. Thus, if an occupant restraint standard requires passive restraints, which as a practical matter can be provided only by an airbag or other nonbelt system, then the standard would be regarded as having the effect of requiring a nonbelt system." 120 CONG. REC. 35,635 (1974) (Representative Staggers). *But see Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1349 (declining to reach contention of petitioners that Modified Standard 208 was not covered by legislative veto provision of 1974 Amendments and should not have been submitted to Congress at all).

with these procedural requirements, and transmitted Modified Standard 208 to Congress on June 30, 1977.

2. *Passive restraints in 1977*

Concurrent resolutions to disapprove Modified Standard 208 were introduced in each house almost immediately upon congressional receipt of the standard. *See, e.g.*, 123 CONG. REC. 21,760 (1977) (resolution introduced by Senator Griffin on June 30, 1977); *id.* at 24,168 (seven identical resolutions introduced in the House on July 20, 1977). These resolutions were then sent to the appropriate committees. In the House, the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce concluded hearings on September 23.[21] The subcommittee voted by voice vote to recommend to the full committee that the resolution of disapproval *not* pass. The full committee voted to table the resolution of disapproval on October 12. As a result, the standard was not considered by the House and no concurrent resolution of disapproval was passed.[22]

In the Senate, four days of hearings were held by the Consumer Subcommittee of the Committee on Commerce, Science, and Transportation. The subcommittee voted unanimously, 5-0, to disapprove the resolution of disapproval. The full committee voted by voice vote to report the resolution to the Senate, again with the recommendation that the resolution of disapproval not pass. S. REP. NO. 481, 95th Cong., 1st Sess. (1977). On October 12,

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[21] *Installation of Passive Restraints in Automobiles: Hearings before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate Finance*, 95th Cong., 1st Sess. (1977).

[22] The subcommittee and committee actions were not reported. This legislative history is recounted in S. REP. NO. 481, 95th Cong., 1st Sess. 2 (1977). *See* 123 CONG. REC. 33,318 (1977) (Senator Ford) (subcommittees and full committees "of both Houses of Congress . . . have voted with bipartisan support to uphold Secretary Brock Adams' decision").

the full Senate voted 65-31 to table the resolution. 123 CONG. REC. 33,332 (1977). Modified Standard 208 could have been disapproved only by concurrent resolution of both houses; neither house voted to disapprove the standard, and Modified Standard 208 thus went into effect.

Throughout the Senate review, Modified Standard 208 received not grudging acceptance but positive support. The Senate report stated that the standard "would provide major increased protection for front-seat automobile occupants" that could save "more than $3.5 billion annually." S. REP. No. 481, 95th Cong., 1st Sess. 2-3 (1977).[23] On the floor, one speaker after another affirmed the need for the standard. *See, e.g.*, 123 CONG. REC. 33,318 (Senator Ford) ("the hearing record contains overwhelming support for the Department of Transportation's rule"); *id.* at 33,319 (Senator Ribicoff) (noting "well proven" efficiency of airbags); *id.* at 33,320 (Senator Durkin) ("the only way to have our citizens protected by passive restraints is to mandate them"); *id.* at 33,325 (Senator Bentsen) (the rule is "in the best interest of the public . . . . [P]assive restraint systems are the most effective way to improve vehicle safety"); *id.* at 33,329 (Senator Magnuson) ("it is time to put this matter to rest"); *id.* at 33,330 (Senator Baker) (supporting standard because "there is ample evidence indicating that air bags are effective in preventing injuries, that they would save thousands of lives and prevent many more serious injuries annually if installed on all cars, and

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[23] Intervenor Motor Vehicle Manufacturers Association (MVMA) characterizes the committee's decision as "a 9 to 7 vote." Brief for Intervenor MVMA (MVMA Brief) at 49 n.55. This is by no means clear. As the Senate Report emphasized, "[t]he only record vote was on the motion of Senator Ford to amend the motion of Senator Griffin," so that Concurrent Resolution 31 be reported unfavorably rather than without recommendation. S. REP. No. 481, 95th Cong., 1st Sess. 25 (1977). The decision to report the resolution to the full Senate was made by voice vote, and only four of the sixteen members of the committee joined in the "minority views." *Id.* at 31 (Senators Cannon, Griffin, Goldwater, and Schmitt).

that they are not hazardous"). Even critics of the standard focused more on the desirability of further testing and promotion of the systems than outright opposition to the standard. *See, e.g., id.* at 33,322 (Senator Goldwater) ("trying to argue against the idea of saving lives is a lot like arguing against free beer and mother love. It is a difficult thing to do"); *id.* at 33,325 (Senator Cannon) (urging DOT to reinstitute Coleman demonstration project); *id.* at 33,327 (Senator Griffin) (seeking more experimentation or reinstatement of Coleman demonstration project).

3. *Passive restraints in 1980*

The refusal by Congress in 1977 to disapprove Modified Standard 208 did not terminate debate on the question of passive restraints. Opponents of passive restraints in the House criticized not only the standard, but the fact that the 1977 resolution of disapproval had been "bottled up" in committee, thus depriving its supporters of opportunity for floor debate. *See, e.g.*, 124 CONG. REC. H 5308 (daily ed. June 12, 1978) (Representative Shuster); *id.* at H 5313 (Representative Devine). As discussed above, *see* p. 12 *supra*, riders were attached to NHTSA appropriations bills for 1979 and 1980 that prohibited DOT from implementing the passive restraint standard in those years. Congress recognized that the standard was not scheduled to be implemented until 1981, however, and these measures did not interfere with NHTSA research and testing of passive restraints. *See id.* at H 5309 (Representative Conte); *id.* at H 5313 (Representative Staggers). Representative Dingell, a co-sponsor of the 1979 rider, observed that "[t]he amendment does not interfere with the progression toward the effective date, model year 1982, of the passive restraint standard." 125 CONG. REC. H 8055 (daily ed. Sept. 18, 1979).[24]

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[24] Other congressional voices during this period were favorable, however. In reporting on the National Traffic and Motor Vehicle

The passive restraint standard was again examined in great detail by the 96th Congress during deliberations on the Motor Vehicle and Cost Savings Authorization Act of 1980. The Senate bill, S. 1159, made no reference to the standard. *See* 125 CONG. REC. S 9166 (daily ed. July 11, 1979). When the House bill, H.R. 2585, came to the floor, a number of speakers praised the standard. *See, e.g., id.* at H 12,282 (daily ed. Dec. 19, 1979) (Representative Staggers) (standard will "save not one, but many thousands" of lives); *id.* (Representative Mineta) (noting "grave concern about any amendments that would have the effect of delaying implementation of the automatic restraint program," and that "[e]ach time the standard has been reviewed, it has been reconfirmed"); *id.* (Representative Maguire) ("we should go forward aggressively with this program"). Other speakers found it "disheartening" that "the Congress again appears to be going along with [NHTSA] in its continuing tendency toward excessive reliance on the airbag." *Id.* at H 12,283 (Representative Cleveland).

On the floor, however, Representative Stockman proposed an amendment to the Safety Act that would have denied NHTSA funds to enforce or administer an occupant restraint system

> unless such standard or regulation also permits the purchaser of a passenger car to select any occupant restraint system which, if installed in the passenger

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Information and Cost Savings Authorizations Act, the House Committee on Interstate and Foreign Commerce referred to a report two years earlier that had found

> a slackening in issuance of new vehicle safety standards since 1970, partly as a result of political pressure against the issuance of FMVSS 208, the passive occupant restraint standard . . . . Since the time of that report, the passive restraint standard has been issued and upheld by the Congress. . . . The committee believes that the agency is now making satisfactory progress in carrying out its legislative mandate.

H.R. REP. No. 1162, 95th Cong., 2d Sess. 9-10 (1978).

> car purchased by such purchaser, would comply with the requirements of Federal Motor Vehicle Safety Standard Number 208 (49 Code of Federal Regulations 571.208), relating to the installation of active seat belt systems, as in effect at the end of June 29, 1977.

Id. at H 12,285. Representative Stockman explained that the amendment "preserves the right of the consumer to choose either an active restraint system, which is the lap-shoulder belt that we have on cars today, or a passive restraint system, which in practice means the airbag for large cars, and the automatic seatbelt for small cars." *Id.*

Representative Scheuer, chairman of the reporting committee, did not oppose the Stockman amendment "because it is only a symbolic amendment with no real or direct legal impact on the Department of Transportation's passive restraint standard." *Id.* He explained:

> The standard is scheduled to go into effect beginning in 1982. This amendment, however, is an amendment to a 1-year bill authorizing the appropriations of funds for carrying out the National Traffic and Motor Vehicle Safety Act for fiscal year 1980 only. Further, the amendment continues to allow for the installation of airbags or passive seatbelts, while providing for an additional option—active seatbelts. This is an option which would have existed regardless of whether this 1-year amendment was adopted.

Id. Representative Stockman responded, however, that "this is a proposal we have not voted on previously. This is a compromise solution that is designed to mandate the introduction of these things into the market, mandate the offering of passive restraints on every car that is sold by any manufacturer in the U.S. market, but give the consumer the choice of which system he will actually choose to have on his car." *Id.* The Stockman amend-

ment passed overwhelmingly, 320-73. It should be noted that most of the members who had earlier praised Modified Standard 208—including Representatives Mineta, Scheuer, and Staggers—were among those voting with the majority. *Id.* at 12,287.

Like the Wyman amendment six years earlier, the Stockman amendment was also discarded when the House and Senate bills went to conference. The Conference Report proposed several important revisions to Modified Standard 208, however, in the form of a proposed amendment to the Safety Act. First, the amendment would have *accelerated* the date by which the standard applied to small cars. H.R. CONF. REP. NO. 1371, 96th Cong., 2d Sess. 15 (1980). The legislative history suggests two reasons for this change. "With the anticipated increase in smaller, more fuel efficient [and more dangerous] cars on the Nation's highways, it is in the interest of public safety that passive occupant restraint protection should be required in these cars as soon as possible." *Id.* Moreover, the standard as promulgated would not have applied to small cars until two years after the effective date for compliance on large cars, and it was felt that this "would place domestic manufacturers at a great disadvantage against foreign competition." 126 CONG. REC. S 13,499 (daily ed. Sept. 25, 1980) (Senator Cannon).

Second, the conference substitute recognized the trend by automobile manufacturers toward phasing out various large car models in favor of smaller ones. It therefore exempted "certain smaller manufacturers from having to install automatic occupant restraint systems in mid-sized cars that will [no longer] be produced after December 31, 1982," although these manufacturers would still be required to comply with the applicable requirements for models produced the following year. H.R. CONF. REP. NO. 1371, 96th Cong., 2d Sess. 15 (1980). Third, the conference substitute would have required that

> beginning with model year 1983, each seatbelt assembly installed in a passenger car must be detachable by the user in a manner which does not impair the subsequent reattachment and performance of the assembly. The conferees intend that the passive belt can be detached at any point, including one adjacent to the inboard anchor.

Id. at 17.

The final and perhaps most significant revision proposed by the conference report concerned airbags. The five automobile manufacturers with the largest sales—GM, Ford, Toyota, Nissan, and Volkswagen—would have been required to "tool and offer for sale" either as an option or as standard equipment airbags on at least one car line in any three of the four model years between September 1981 and September 1985. The conference report provided careful definitions of "tooling up" and "car line," [25] and added:

> It is clearly the expectation of the conferees that consumers have a meaningful choice in the market between vehicles equipped with automatic safety belts and with airbags. It is the hope of the conferees that the public will be informed of such choices and that automatic safety belts and airbags be made available at reasonable cost.

Id. at 16.

As Representative Maguire observed during the House consideration of the conference report, the requirement that larger car companies offer airbags "is a major

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[25] To "tool for production" meant that "a manufacturer must demonstrate that he has the capability for assembling cars with airbags on an assembly line in the customary fashion of the manufacturer." H.R. CONF. REP. No. 1371, 96th Cong., 2d Sess. 16 (1980); *see id.* (defining "car line"). "Further, it is the intent of the conferees that automatic safety airbags be made generally available and not limited to esoteric cars which are offered to a limited market for the purpose of frustrating the legislative intent." *Id.*

change in policy." 126 CONG. REC. H 10,196 (daily ed. Oct. 1, 1980). Prior to this time, proponents of the passive restraint standard had always emphasized that

> [t]he standard is a performance standard which does not require that any specific technology be utilized by automobile manufacturers . . . . Thus, the standard does not mandate that air cushion restraint systems (the air bag) be used. Passive belts may be used, or any other technology which meets the standard.

S. REP. No. 481, 95th Cong., 1st Sess. 1 (1977); *see id.* at 17-18 (explaining reasons for not requiring airbags as a mandatory option). Now, for the first time, a committee of Congress "has gone on record to assure consumers freedom of choice in the selection of restraint systems by requiring that some airbags be made available to consumers who want to buy them." 126 CONG. REC. H 10,196 (daily ed. Oct. 1, 1980) (Representative Maguire); *see id.* at H 10,194 (Representative Scheuer).

This "major change in policy" raised certain procedural problems, however, because Congress frowns on conference reports that depart significantly from the bills passed in the separate houses. The Senate adopted the conference report, without a recorded vote. 126 CONG. REC. S 13,506 (daily ed. Sept. 25, 1980). As had been the case in 1977, most comments on the standard were favorable. *See, e.g., id.* at S 13,502-03 (Senator Warner) (supporting "the concept for automatic occupant protection" because vehicle fatalities and injuries have reached "epidemic proportions,' costing society billions of dollars annually). In the House, however, points of order were raised against the conference report because of clauses 3 and 4 of House Rule XXVII, rules of scope and germaneness designed to prevent conferees from writing new legislation in conference.

In such a situation, the conference report may still be considered in two ways. The more common is to obtain

a rule from the House Committee on Rules waiving the points of order. Alternatively, the conference report can be considered under a suspension of the rules, although this requires a two-thirds vote before the report is passed. The sponsors of the 1980 conference report chose the second course, a highly unusual move suggesting their confidence that the report would be accepted. *See* 126 CONG. REC. H 10,194 (Representative Scheuer) ("The conferees carefully constructed a compromise which is simultaneously supported by [DOT and NHTSA] and which GM and Ford have both said they can live with"). The reaction in the House was mixed, however. *Compare id.* at H 10,204 (Representative Mineta) ("The agreement reached by the conferees is a strong endorsement of the automatic crash protection standard 208") *with id.* at H 10,198 (Representative Frenzel) ("this is the first time that the Congress will have ever mandated airbags by law and, because of that, in my judgment, this conference report ought to be rejected out of hand"). A majority of the House voted in favor of the report, 209-192, but this was less than the two-thirds vote required under the suspension of the rules.

The sponsors of the conference report then sought and obtained a rule that would waive points of order. H.R. REP. NO. 1500, 96th Cong., 2d Sess. (1980) (10-4 vote of House Committee on Rules in favor of such a rule); *see* 126 CONG. REC. H 11,912 (daily ed. Dec. 4, 1980) (Representative Bolling). This rule was strongly opposed on the floor, however, and was narrowly defeated, 165-168. *Id.* at H 11,918; *see id.* at H 11,912 (Representative Quillen) ("If we do not draw that line now, we will be inviting future conferees to write completely new legislation in conference in total disregard of the wishes of the House"). As before, however, Congress recognized that the battle over amendments to Modified Standard 208 did not prevent the standard from taking effect. Representative Dingell observed:

> Mr. Speaker, this is not a partisan question. . . . The question is not even whether airbags or passive restraints are going in, because under existing law passive restraints, as opposed to airbags, which include airbags but which also include other devices such as passive belts, are still required under regulation and some passive belts and others are and new ones will shortly be on the market.

Id. at H 11,913. Minutes later, Representative Dingell repeated that "if we reject this proposal, Airbags and Motor Vehicle Safety Standard 208, which is a performance standard, will still be in place and will not be affected by the action of the House in rejecting the action of a group of runaway conferees who have openly flaunted and disregarded the will of the House." *Id.* at H 11,916.

This latter effort to waive points of order against the conference report was made on December 4, 1980, the day before the end of session. On December 5, Representatives Dingell and Broyhill urged passage of "a compromise bill," H.R. 8379, which Representative Dingell explained "is again an attempt to see to it that the consumer has an opportunity for choice in the purchase of passive restraints without mandating air bags in passenger automobiles." 126 CONG. REC. H 12,119 (daily ed. Dec. 5, 1980). The compromise bill also proposed to reverse the effective dates of Modified Standard 208, requiring that small cars comply before large cars, but would have retained the requirement that all cars have passive restraints by 1984. A large number of the representatives who had voted *in favor* of the Conference Report now voted *against* H.R. 8379, however. Representative Leland commented:

> To reverse decisions that have been made in behalf of the people of America and their safety, in my estimation, is a matter of madness and in the vernacular of the community from whence I come, this bill is jive.

Id. at H 12,123. *See id.* (Representative Eckhardt); *id.* (Representative Conyers). A majority voted in favor of the compromise bill, 205-126. But because it too had been considered under a suspension of the rules, H.R. 8379 also was rejected, and never even came up for consideration in the Senate.

In summary, each of the three periods during which Congress closely considered the passive restraint standard represents a different type of legislative action. In 1974, Congress banned the ignition interlock but did not foreclose NHTSA's pursuit of a passive restraint standard. In 1977, Congress allowed the standard to take effect when neither of the concurrent resolutions needed for disapproval was passed. In 1980, a majority of each house indicated support for the concept of mandatory passive restraints, and a majority of each house supported the unprecedented attempt to require some installation of airbags. None of these acts carries the weight of positive law, of course. The 1977 failure to disapprove the standard cannot be read as a congressional enactment—even though it is easier to obtain a two-house veto than passage of a bill—and the 1980 efforts failed to become law. Reading this legislative history as a whole, however, suggests a congressional commitment to the concept of automatic crash protection devices for vehicle occupants that we may not take lightly.

B. *The Scope of Review in this Case*

Based on the legislative reaction to the passive restraint standard discussed above, we conclude that rescission of the standard must be subject to "thorough, probing, in-depth review" lest the congressional will be ignored. On the facts of this case, our review must be as "searching and careful" as the judicial review in *Pacific Legal Foundation v. Dep't of Transportation*, where the issue was the promulgation rather than the rescission of Modified Standard 208.

Mere legislative silence in the face of agency action is a hazardous basis from which to infer congressional approval of the agency's interpretation of the statutes involved. "However, a consistent administrative interpretation, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970); *see Udall v. Tallman*, 380 U.S. 1, 17-18 (1965). The Safety Act directs that the Secretary "shall" issue appropriate motor vehicle safety standards; ordinarily this term "is the language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (Cardozo, J.). Despite the legislative battles over whether to specify an airbag requirement or when the standard should take effect, each time Congress reviewed the passive restraint standard it was essentially confirmed. "In the matter before us there is not merely silence, proposals languishing without any Congressional action, but positive action by Congress rejecting the limiting amendments." *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971). Although there may be situations in which an agency may repeal a regulation on no basis at all, such is not the case here. NHTSA is not writing on a clean slate; it cannot suggest that the congressional actions and failures to act described above have no bearing on the agency's freedom to regulate on this question. It follows that NHTSA has the burden of explaining why it has changed course, and of showing that rescission of Modified Standard 208 was reasonable.[26]

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[26] NHTSA denies that there has been any "fundamental policy change," NHTSA Brief at 19, and contends that placing the burden on NHTSA to sustain the validity of its action would "transgress the boundaries between judicial and legislative functions." *Id.* at 24. NHTSA's argument that there has been no policy change is somewhat disingenuous, however, because the agency immediately goes on to justify that change on the merits. *See, e.g., id.* at 20 ("The changed facts since the Adams decision required the Administrator to make a different decision"); *id.* at 19 (earlier Adams de-

This does not mean that NHTSA may not revoke the standard. If the agency clearly articulates a reasonable basis for that action, we must defer to the policy judgments and expertise of the agency. By no means may we substitute the court's judgment, or fail to "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The line between substitution of judgment and judging whether action has been rational or arbitrary is sometimes fine, and to some critics imperceptible. We fully recognize, however, the side of that line from which the court derives its lawful authority. We also recognize that the course of administrative action is frequently and inevitably characterized by shifts and turns, as agencies continually reassess what is in the public interest. But courts are "not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Judicial scrutiny of agency action—including the rescission of a rule—depends on the extent to which the agency has deviated from congressional expectations. An agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress.

We therefore review NHTSA's rescission of Modified Standard 208 for whether the agency has engaged in reasoned decisionmaking, making actual judgments concerning the significance of the evidence in the record and

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cision "was itself a reversal" of the Coleman decision). *See generally* 46 Fed. Reg. at 53,419 (purpose of rulemaking was to ensure that standard "reflects the changes in circumstances since the automatic restraint requirements were issued"); RIA at II-7 to II-10, J.A. 33-36 (rising gasoline prices, economic downturn, lower automobile sales and rising unemployment required changing the standard).

supporting its decision with "reasoned analysis." *City of Charlottesville v. FERC*, 661 F.2d 945, 951 n.35 (D.C. Cir. 1981). We must ascertain the facts on which NHTSA relied, determine whether those facts have some basis in the record, and judge whether a reasonable decisionmaker could respond to those facts as the agency did. *Recording Industry Ass'n v. Copyright Royalty Tribunal*, slip op. at 15. The court must also assure itself that rescission is "based on consideration of the relevant factors," *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802-03 (1978); *see Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), and determine that NHTSA made "a considered evaluation of the presently available alternatives." *Pillai v. CAB*, 485 F.2d 1018, 1029 (D.C. Cir. 1973). With this statement of the appropriate scope of our review, we turn to the merits of NHTSA's action.

III. The Arbitrariness of Rescission

The rescission of Modified Standard 208 on the grounds stated by NHTSA was arbitrary and illogical for two general reasons. The agency has offered no evidence that seatbelt usage will fail to increase as was expected when the standard was first promulgated, and has therefore made no showing that the standard is unjustified as written. More important, NHTSA has failed to consider or analyze obvious alternatives to rescission, and has thus artificially foreclosed attempts to further the purpose of the Safety Act. *See Pillai v. CAB*, 485 F.2d 1018, 1027 (D.C. Cir. 1973). When the agency so narrows its options that it fails to heed the goals that Congress has asked it to meet, the agency violates its basic legislative mandate. Simply put, NHTSA's discussion of ways in which Modified Standard 208 could have been amended was wholly inadequate, and rescission was therefore arbitrary and unlawful.

A. *Modified Standard 208 as Written*

NHTSA made three findings in deciding that the standard as written could not be justified, and should either be amended or rescinded. First, most automobile manufacturers planned to use detachable passive belts. Second, once detached, a detachable belt "becomes identical to a manual belt." Finally, NHTSA "cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase." *See* 46 Fed. Reg. 53,421-23.

Although the petitioners challenge each step of this reasoning, we conclude that NHTSA's first finding was not unreasonable. The prediction of how industries plan to comply with an agency regulation is exactly the sort of factual question on which the agency's expert "administrative feel" deserves the greatest deference. It was not unreasonable for NHTSA to conclude, from the comments that appear in the record, that most manufacturers did indeed plan to install detachable passive seatbelts in order to comply with the passive restraint standard.[27]

NHTSA's second finding is also reasonable, although it is important to note the limitations of this finding. The observation that a detachable belt, once detached, is functionally equivalent to a manual belt, does not dictate any conclusion about the usage rate of detachable belts. Any suggestion that this finding alone leads to a prediction that usage rates under the two systems would be identical is inconsistent with NHTSA's third finding, which

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[27] *See* note 11 *supra*; MVMA Brief at 28 n.30. We recognize, of course, that although deference must be given to this agency finding, it may nevertheless be erroneous. *See* NAII Brief at 25 ("logic would suggest that given a choice between two passive restraint systems of equal cost and consumer acceptance, manufacturers would choose the one that is the safest"). Indeed, the primary empirical problem in this case arises precisely because automobile makers have *not* used detachable belts thus far in voluntarily providing passive restraints. *See* note 30 *infra*.

acknowledged that even detachable passive belts would make some difference in seatbelt usage.[28] The rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up.

In taking this third step, NHTSA turned the question on its head and thus totally misdirected its analysis. There may well be "substantial uncertainty" about the seatbelt usage rates that can be predicted if detachable belts are widely used. But the question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so. This evidence may take the form of statistical data or logical argument, but it must exist in some form. To state this point in the reverse, it would be unreasonable for an agency to promulgate a regulation simply because of "substantial uncertainty" that the status quo was any better. There must be *some* reason to support *any* reasoned decision.

There is not one iota of evidence to support NHTSA's conclusion that Modified Standard 208 as written will fail to increase nationwide seatbelt use by 13 percentage points or more. No logical reason has been suggested why even detachable belts—except under a certain condition whose frequency is not known—cannot lead to safety benefits that exceed their relatively small mar-

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[28] 46 Fed. Reg. at 53,425. This conclusion is certainly supported by logic, because whereas a *detached* belt may be "identical to a manual belt," a *connected* belt is identical to a passive restraint. If users at some point detach these belts, they may indeed leave the belts unattached for a series of their subsequent trips. When those users remember to reattach the belts, however, inertia is again on the side of belt usage. *See* note 33 *infra*.

ginal costs.[29] Statistics concerning usage rates of the passive seatbelts now in service suggest exactly the opposite, and NHTSA's conjectural efforts to distinguish these systems miss the point.[30] If, as NHTSA contends,

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[29] *See* note 9 *supra* (marginal cost of VW passive belts is $50). As NHTSA observes, "[w]ith car prices increasing annually by more than $1,000, the added price of automatic restraints, although not insignificant, is still a small portion of total increases and may go undetected by consumers." RIA at IX-4, J.A. 219.

[30] *See* note 12 *supra* (passive restraints now in use increase usage rates on particular models to between 70 and 90%). Although NHTSA refused to extrapolate from these statistics for the reasons discussed in note 14 *supra*, this merely left the agency with *no* data "which can be used to predict automatic belt usage." RIA at IV-55, J.A. 111. *See* NHTSA Brief at 36-37 (agency had a "total absence of empirical and attitudinal information on the readily detachable belt").

We note that NHTSA's reasons for refusing to extrapolate from the available data are extremely weak. Three of the four factors discussed in note 14 *supra* were undercut by the agency's own analysis. *See* RIA at IV-54, J.A. 110 ("generally it is not true" that voluntarism biases existing data, because a number of current users "did not know they were getting automatic belts and others accepted the automatic belt equipped car because it was the only car available with the other options they wanted"); *id.* (demographic argument "is somewhat, although not totally, negated" by adjusting data to acount for higher usage of manual belts; moreover, although VW owners may be atypical of the fleet, GM Chevette owners are not). NHTSA's final concern was that interlocks on some of these vehicles "would account for four-fifths of the [usage] increase observed." There are three major difficulties with this undocumented conclusion. First, although GM eliminated the interlock on the 1980 Chevette, the usage rate of passive belts on those models actually *increased* over the interlocks-guarded belts on 1978 and 1979 Chevettes. *See* RIA at IV-33, B-8, J.A. 89, 292 (38% incremental use on 1979 model, 39% incremental use on 1980 model). Second, NHTSA's surveys suggested that the high usage rates on current models should be attributed to factors other than the coercive effect of the interlock. *See id.* at IV-36, J.A. 92 (67% of VW owners in Opinion Research Corporation survey said they would use the passive belts even if there were no interlock); *id.* (same survey finding more favorable later impressions than first

the passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, then only a well justified refusal to seek more evidence could render rescission non-arbitrary. *National Ass'n of Demolition Contractors v. Costle*, 565 F.2d 748, 751-52 (D.C. Cir. 1977). NHTSA could have conducted surveys or experimented with detachable belt prototypes, or it could have explained logically why usage rates with detachable belts would increase less than 13 percentage points. The agency did not do so; it rested its decision only on "sub-

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impressions of passive belts); *id.* at IV-40, J.A. 96 (focus group studies identifying common reaction to passive belts of "relief" that automatic belts could resolve conflict between what passengers feel they should do and what they actually do). *See generally* note 33 *infra*. Finally, the record suggests that the effect of interlocks may actually be relatively insignificant in promoting seatbelt use. *See* RIA at IV-39, J.A. 95 (NHTSA rental car survey showing 13% use of shoulder belts without interlock and 15% use with interlocks). *See generally* note 12 *supra* (interlocks in 1975 only succeeded in raising manual belt use from 20% to 40%).

In their briefs, NHTSA and MVMA suggest yet another reason not to extrapolate from current data. The alleged consumer resistance to the 1980 Chevette, *see* NHTSA Brief at 13 n.7, MVMA Brief at 57 n.66, is said to show that negative consumer reaction would have "an increasingly adverse effect on overall seat belt usage rates." NHTSA Brief at 58. Aside from the fact that post-hoc rationalizations of counsel carry no weight in our review of agency decisionmaking, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962), it is difficult to see exactly how speculation about abstract consumer preferences detracts from concrete data concerning current usage rates. As NHTSA observes, "GM's comparison of voluntary purchase of automatic belts in Chevettes to potential consumer reaction to mandated automatic belts may be fallacious." RIA at IX-4, J.A. 219. Consumers may voluntarily purchase passive restraints with low frequency for the same reason that vehicle occupants wear manual belts with low frequency, *i.e.* "people obviously have little information on either the safety risks inherent in motor vehicle travel or the relative benefit of belts, be they manual or automatic." *Id.* at IX-5, J.A. 220. *See id.* at IV-41, J.A. 97 (Americans view collision survival "in very unsophisticated terms," with "virtually no apparent awareness of 'secondary collision' "). *See generally* note 33 *infra*.

stantial uncertainty" about these rates. Its decision to rescind the standard thus was arbitrary because the decision was supported by no record evidence whatsoever.

We do not mean this portion of our opinion to seem simplistic. Implicitly, the perpetuation of a regulation also involves a decision that its continuation is worthwhile, and reasonable decisionmaking requires that this too be supported by reasons. If NHTSA was uncertain that Modified Standard 208 would lead to the required usage increase, it could reasonably have decided to suspend or amend the regulation rather than plunge ahead in the blind faith that the standard would succeed. Indeed, this was originally how the agency framed the questions that led to the most recent rulemaking proceedings.[31] But it is one thing to decide that evidence fails to show the wisdom of continuing with a regulatory program, and quite another to decide that evidence shows the regulatory program should be abandoned altogether. There is no evidence at all that detachable passive belts will fail to increase seatbelt usage by 13 or even 50 percentage points, and NHTSA thus went one step further than reason can support.

B. *Other Forms of Modified Standard 208*

NHTSA explicitly considered a series of alternative amendments to Modified Standard 208 before deciding to rescind the standard. Its notice of proposed rulemaking

> proposes a wide range of possible changes to the automatic restraint requirements . . . . The Department desires to ensure that it is taking the most effective and reasonable approach to addressing the serious safety problem posed by the low rate of

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[31] *See* text at note 32 *infra*. DOT noted its concern that several automobile manufacturers "plan automatic belts [sic] designs which have a release buckle identical to the buckle on current manual belt systems," with the result that "[u]sage could thus in fact turn out to be low." 46 Fed. Reg. at 21,176 (April 9, 1981).

safety belt use in all cars and by the steadily decreasing average size of new cars sold in this country.

46 Fed. Reg. at 21,205-06. The agency considered whether to reverse the sequence of compliance so that small cars would be required to comply before large cars, and whether to amend the standard so as to require simultaneous implementation on all car sizes. NHTSA also considered amending the standard in order to exempt the front center seating position, while retaining the requirements for the driver and front right passenger seats. In reviewing these possibilities, NHTSA's Regulatory Impact Analysis (RIA) was impressively thorough and careful.[32]

In striking contrast, neither NHTSA's decision nor its RIA devoted even a modicum of reasoned analysis to several far more obvious possible amendments to Modified Standard 208. The decision briefly discussed—and summarily rejected—amending the standard so as to eliminate compliance by detachable belts. The RIA, which was otherwise replete with economic and safety estimates and other data, did not once attempt to analyze the consequences of such an amendment. Even more striking is the agency's failure to consider amending the passive

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[32] *See, e.g.*, RIA at IV-63 to IV-71, J.A. 119-27. NHTSA's discussion of whether to delete the requirement of passive protection for front center seating positions was a model of careful analysis. *See id.* at IV-73, J.A. 129 (analyzing deaths by seating position); *id.* at IV-79, J.A. 135 (adjusting fatality figures for front right position to reflect the fact that bucket seats would prevent passengers from sitting in center seat); *id.* at IV-86, J.A. 142 (analyzing net impact on fatalities and injuries). In short, NHTSA devoted 15 pages of its RIA to a discussion that "has no relevance if the standard is rescinded," *id.*, but declined to analyze airbags or continuous belts because this "would be engaging in a mythical paper exercise" given the intentions of automobile manufacturers to comply primarily with detachable belts. *Id.* at IV-56, J.A. 112.

restraint standard so as to allow compliance with airbags only. In both the decision and the RIA, airbags are mentioned only in passing and only in the context of predicting that automobile manufacturers would not install them on a widespread basis. Absolutely no effort was made to compare the costs of airbags against their potential benefits, an omission that is particularly notable because none of the problems that NHTSA identified with passive belts appears to apply to airbags.

In proceeding as it did, NHTSA allowed itself to become captive to the ways in which it predicted automobile manufacturers would comply with Modified Standard 208. Lip service aside, there is no indication of the agency's awareness that it could act positively to develop a passive restraint standard that would advance the purposes of the Safety Act. Courts frequently observe that regulatory agencies do not function "as an umpire blandly calling balls and strikes for adversaries appearing before" them. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). If NHTSA did not believe the standard as written would fulfill the standard's goals, its foremost obligation was to consider whether an amended standard could. The agency's reasons for not prohibiting compliance with detachable belts are hollow, and its analysis of requiring exclusive compliance with airbags is nonexistent. NHTSA was not required to follow either avenue, of course, but it may not reject these possibilities without reasoned discussion. In stating that "the central issue in this proceeding has become whether [detachable] automatic belts would induce higher belt usage rates than are occurring with manual belts," 46 Fed. Reg. at 53,425, NHTSA lost sight of its statutory obligation to devise the best passenger safety regulation it could. By artificially narrowing the options available—or ignoring those options completely—the agency acted in a totally arbitrary fashion.

1. *Continuous belts*

As in its assessment of Modified Standard 208 as written, NHTSA's discussion of whether to require only continuous passive belts starts by asking the wrong question. The issue is not whether exclusive reliance on continuous belts would be superior to detachable belts, but whether detachable belts comply with the passive restraint standard at all. NHTSA boldly declared that "[o]nce a detachable automatic belt is detached, it becomes identical to a manual belt. . . . [I]ts use thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts." 46 Fed. Reg. at 53,421. If so, the obvious question is whether detachable belts conform to the requirements of the passive restraint standard, which requires compliance "by means that require no action by vehicle occupants." 49 C.F.R. § 571.208, S4.1.1.1. Whether a detachable belt is in fact a passive restraint may depend on the usage rates of these belts—a matter that NHTSA has not yet established. But if detachable belts do not comply with the passive restraint regulation, NHTSA should have concentrated its analysis on safety devices that do.

Time after time, members of Congress as well as NHTSA have emphasized that a safety restraint requiring affirmative action is not a passive restraint. For the last decade, the agency has explained that a passive restraint requires "no action other than would be required if the protective system were not present in the vehicle." 36 Fed. Reg. at 8296 (May 4, 1971). "The essence of a passive restraint is that it provides at least the minimum level of protection without relying on occupant action to deploy the restraint." 39 Fed. Reg. at 14,594 (April 25, 1974). "Automatic restraints are systems that require no action, such as buckling a seat belt, by vehicle occupants to be effective." 46 Fed. Reg. at 12,033 (Feb. 12, 1981). *See* 123 CONG. REC. 33,321 (1977) (Senator Griffin) (a passive restraint "is something that

does not require any activity on the part of the occupant of the car"); S. REP. No. 481, 95th Cong., 1st Sess. 1 (1977) ("Passive restraints are defined in the rule to mean any front seat occupant restraint which protects the occupant . . . without the occupant having to activate it"). It is difficult to imagine an agency decision that could be more irrational than rescinding a regulation because of problems identified in industry actions that do not comply with that regulation. If detachable belts function as poorly as NHTSA says they would, then NHTSA's discussion of these belts is worse than irrelevant because detachable belts are not passive restraints at all.

Modified Standard 208 is a performance standard, which means that compliance may be in the form of any technology "which meets the standard." S. REP. No. 481, *supra*, at 1; *see* 123 CONG. REC. 33,318 (1977) (Senator Ford) ("any technology which meets the standard can be utilized"). It is almost embarrassingly obvious that technology that does *not* meet the performance standard may *not* be used. NHTSA's discussion of detachable belts versus continuous belts ignores this elementary point. Its decision not to amend the standard so as to allow only continuous passive belts is therefore fundamentally flawed by NHTSA's failure to consider that the standard might only permit use of such belts in the first place. Essentially, the agency seems to conclude that because some technology will *not* meet the passive restraint standard, it need not mandate compliance by technology that will. The absurdity of this Orwellian reasoning is obvious.

The explicit reasons stated by NHTSA for refusing to mandate compliance only with continuous passive belts also seem capricious. The first reason stated was the congressional prohibition on interlocks, and the fear that "Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt

system." 46 Fed. Reg. at 53,424. NHTSA's discussion of the interlock is absolutely irrelevant, of course, because the 1974 Amendments prevent it from mandating such devices. Of more serious concern is NHTSA's apparent belief that interlocks and other "use-compelling features" are equivalent. There is absolutely no evidence to support such a conclusion; indeed, every indication in the record points the other way.[33] The distinc-

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[33] *See, e.g.*, 42 Fed. Reg. at 34,290 (Secretary Adams distinguished interlocks from passive restraints because interlock requires affirmative action whereas passive restraints, by definition, do not); 36 Fed. Reg. at 8296 (May 4, 1971) (interlocks require "forced action" and thus do not qualify as passive restraints); *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1346 (approving this reasoning); RIA at II-4, J.A. 30 (noting same distinction).

The importance of this distinction deserves emphasis. NHTSA devoted much of its analysis to the question of why current seatbelt use is low. *See* RIA at IV-25, J.A. 81 (1978 survey by Teknekron, Inc., finding following reasons for not using belts: "bothersome, inconvenient, forgot," 68%; "uncomfortable," 14%; all other responses, less than 8%); 1981 National Safety Belt Study, J.A. 1108 (hereinafter cited as *Study*) ("too much time/hassle," 25%; "not in habit/don't think about it/lazy," 22%; "uncomfortable/too confining," 20%; all other responses, less than 7%); RIA at IV-27, J.A. 83 (GM-funded survey finding that riders "who get in the habit of attaching belts, as part of a check-off system to start the car, habitually wear them"). *See generally* Arnould & Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 BELL J. ECONOMICS 27, 29-35 (Spring 1981) (decision whether to wear seatbelt involves "a very low probability (on the order of 10^{-4} or 10^{-5}) of very adverse outcomes (i.e., serious injury or loss of life)," suggesting that low seatbelt use reflects the "limited capability of individuals to attend to rare events"). These are exactly the factors that automatic restraints are intended to address. *See id.* at 36 ("striking difference" between usage rates of VW manual and automatic belts "suggests that discomfort costs are not the key reason for the observed nonutilization of manual belt systems. In particular, VW was able to shift the habitual behavior of car occupants from nonusers to users simply by eliminating the time and discomfort costs of buckling up, while at the same time imposing small but real costs on those who might be inclined toward nonuse.").

tion lies in the use that is "compelled": interlocks require affirmative action, but continuous passive belts do not. The very concept of a passive restraint standard presupposes "use-inducing" safety equipment. NHTSA's argument about congressional disfavor toward continuous belts, based only on the fact that such belts would work better than detachable belts, is thus belied by the legislative history discussed above.

Had Congress desired to repeal the passive restraint standard in 1974, it was free to do so. Instead, Congress legislated with great specificity concerning the aspects of the standard that it wanted to change—requiring, for example, that a warning buzzer not exceed eight seconds in duration—and retained the explicit right to review other aspects of the standard at a later date. The possibility of a later legislative veto is far different from a legislative prohibition, however, and NHTSA assumes too much when it tries to read into this congressional action a hostility to an effective passive restraint standard. NHTSA errs when it presumes that it knows how to speak more clearly than Congress. The 1974 Amendments do not provide the slightest support for NHTSA's refusal to consider a passive restraint standard that could be satisfied with continuous but not detachable belts.

The last two explicit reasons given by NHTSA for refusing to mandate compliance only with continuous belts are somewhat inconsistent: the public's "widespread, latent and irrational fear" about being trapped by seatbelts, and the concern that a "use-compelling feature" could not be required consistent with "the cause of safety." *Id.* Considerable doubt exists about the strength of the first finding.[34] More important, NHTSA's

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[34] This finding was based on the *Study*, *supra* note 33, in which fear of being trapped was given by 7% of the respondents as a reason for not wearing seatbelts. This factor thus seems to have little relevance to why vehicle occupants fail to use seatbelts, *see*

second finding—clearly more fundamental to any agency charged with mandating safety standards—is squarely contradicted by the explicit requirement of an "emergency release mechanism" in the passive restraint standard. *See* 42 C.F.R. § 571.208, S4.5.3.3(a). NHTSA has not suggested, nor is there any evidence for such a proposition, that the emergency release mechanisms on continuous belts are any more susceptible to jamming or locking in the event of a collision than the latch mechanisms on detachable or manual belts. Indeed, for all that appears on this record, the emergency release on a continuous belt may be *more* dependable than that on a detachable belt. In any event, NHTSA also notes that if an accident occurs, "occupants wearing belts suffer significantly *reduced* risk of loss of consciousness, and are commonly able to extricate themselves with relative ease." 46 Fed. Reg. at 53,424 (emphasis added). There is no evidence to support the suggestion that "further

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note 33 *supra*. More important, this factor appears to be overemphasized in NHTSA's analysis: "Nearly all previous studies have shown a 'hard core' population (20-40 percent) of car occupants who will not wear a belt under any circumstances." RIA at IX-5, J.A. 220. *See generally* note 12 *supra* (interlock increased usage to 40%, and even passive belts have not increased usage more than 90%). Because a passive restraint standard would be economically justified if usage increased 13 percentage points, *see* text at note 10 *supra*, the existence of this "hard core" of nonusers seems irrelevant.

The petitioners also attack NHTSA's reliance on this limited finding from the *Study* on procedural grounds, noting that the *Study* was entered into the rulemaking docket only two days prior to the date that Notice 25 was announced and thus without giving the parties an opportunity to evaluate and comment on its findings. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). NHTSA responds that "the study was not critical to the outcome of the rulemaking" because it duplicated other evidence in the record, and thus "the procedural error, if any, was harmless." NHTSA Brief at 56 n.22. Because of our disposition of this petition for review, we do not reach this question.

complicat[ing] the extrication" of occupants after collisions, if that occurs at all, will not be more than offset by the advantages of increased belt use.

Instead, there is every indication here that continuous belts—which would not require or be guarded by interlocks—would increase belt usage more than enough to meet the agency's justifiable concerns about the standard's cost.[35] Such belts could never "become identical to a manual belt," *id.* at 53,421, and clearly "would increase belt usage." *Id.* at 53,423. NHTSA has not analyzed the magnitude of this increase, or whether a standard permitting continuous belts only would make Modified Standard 208 the cost-effective regulation that Congress expected it to be. If continuous passive belts worked effectively, of course, this would dispatch NHTSA's implicit concern about public backlash against "an expensive example of *ineffective* regulation." *Id.* at 53,424 (emphasis added). Until NHTSA at least analyzes the consequences of a continuous-belt-only standard, there is no way to know whether this form of the passive restraint standard is justified. At the same time, until NHTSA considers this obvious alternative, its rescission of the entire standard must be considered arbitrary.

2. *Airbags*

If NHTSA's consideration of continuous belts was minimal, its analysis of airbags was nonexistent. Time and again, the agency failed or flatly refused to evaluate the cost-effectiveness of these devices. The only mention of airbags in the decision focused on Modified Standard 208 as written:

> Instead of installing air bags in approximately 60 percent of new cars [as had been anticipated in 1977], the manufacturers apparently planned to in-

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[35] *See* notes, 9, 12, 33 *supra*. Usage rates on GM's 1980 Chevette —which does not have an interlock—far exceeded the 24% rate that NHTSA concluded would make the standard economically justified. We emphasize, of course, that the agency has not yet performed this analysis.

> stall them in less than 1 percent of new cars. Thus, automatic belts would have been the predominant means of compliance, and installed in approximately 99% of new cars. Thus, the assumed life-saving potential of air bags would not have been realized.

46 Fed. Reg. at 53,421. It is obvious that airbags would be installed in 100% of new cars if NHTSA were to decide that no passive belts advanced the purpose of the safety standard and that airbags were the only way of complying with Modified Standard 208. NHTSA apparently did not consider this possibility. *See* RIA at IV-10, J.A. 66 (because airbags will be installed on a small scale, "the fatality reduction potential of air bags will not be considered in the main body of the analysis"); *id.* at IV-56, J.A. 112 ("Although benefits would be greater if [large cars were equipped with airbags], it does not now appear that this will happen"); *id.* at VI-19, J.A. 181 ("the Air cushion costs are not dealt with in this analysis as the domestic manufacturers have decided to use automatic safety belts rather than air bags to comply with the standard"); *id.* at XI-5, J.A. 265 ("The issue of air bags, constant and controversial as it is, is not in fact squarely before the Agency at this time").

NHTSA's failure to consider this obvious alternative is particularly striking in view of the history of the passive restraint standard. "To some, FMVSS 208 was always intended to be an air bag standard." RIA at XI-5, J.A. 265. The first notice of proposed rulemaking leading to the 1972 version of Standard 208 referred to "inflatable occupant restraint systems," 34 Fed. Reg. at 11,148 (1969), and passive belts were added thereafter. *See* pp. 7-8 *supra*. In *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d at 664, the court suggested that the standard might be called "more descriptively, the Airbag Standard." Congress too has tended to consider airbags the central aspect of the passive restraint standard. *See*,

e.g., 120 CONG. REC. 35,637 (1974) (Representative Dingell) (observing "the desire of the Congress to review and, if appropriate, disapprove a standard imposing air bags on our constituents"); 124 CONG. REC. H 5309 (daily ed. June 12, 1978) (Representative Conte) ("The airbag does not go into effect until 1982"); H.R. REP. No. 145, 96th Cong., 1st Sess. 13-15 (1979) (supplemental views) (discussing only airbags). In 1977, when Senator Griffin added Senator Helms as a sponsor of S. Res. 31 to disapprove Modified Standard 208, the resolution was described as a measure to ban "the use of air bags in automobiles." 123 CONG. REC. 24,879 (1977). It is true that airbags also have been the most controversial aspect of the passive restraint standard. *See* pp. 43-47 *supra* (Senate but not House approved conference report that would have required automobile manufacturers to offer airbags on at least one car line). But this is all the more reason why NHTSA should at least have considered and evaluated the benefits and costs of a standard relying only on airbags before it could rationally rescind Modified Standard 208.

This is virtually self-evident. First, as NHTSA acknowledged in the RIA, the agency

> has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use, such that it could be considered an acceptable method of compliance with the mandates of the Act.

Id. at XI-4, J.A. 264. More important, airbags seem to have none of the problems that NHTSA identified in passive seatbelts. They are less obtrusive and therefore less likely to be disconnected because of "irrational fears" about being trapped. *See id.* at IX-18, J.A. 233. They cannot be analogized to manual seatbelts, and thus their rate of "use" is likely to be higher than that of passive belts. *See id.* at IV-9, 89-90, J.A. 65, 145-46. Moreover,

even when used, neither seatbelts nor airbags are completely effective in preventing deaths and injuries under all circumstances, but the "effectiveness" of airbags may be relatively higher. *See id.* at IV-9, J.A. 65.[36] Finally, whereas NHTSA emphasized its uncertainty that discounts in insurance premiums would "materialize on a general basis" under a passive belt regime, *see* 46 Fed. Reg. at 53,423, it observed that a number of insurance companies *already* offer a 30 percent discount on policies for vehicles equipped with airbags. RIA at V-1, J.A. 149.[37] Each of these points suggests that the benefits of an airbags-only standard would be significantly greater than the minimal benefits now predicted from Modified Standard 208 as written. Yet NHTSA made no attempt whatsoever to evaluate or even mention such a standard.

The agency did, of course, review the cost of airbags. As it observed, the unit cost of these devices is remarkably sensitive to economies of scale, ranging from as high

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[36] NHTSA found that manual and passive seatbelts, when used, had an effectiveness of roughly 50% for fatalities and 65% for serious injuries. RIA at IV-8, J.A. 64. When airbags are used in tandem with lap belts, their effectiveness is apparently slightly higher. As a result, NHTSA concluded that even if airbags were installed on only .5% of the 1984 model year fleet, this "results in a change in fatality reduction of 70 lives saved" over the predictions for 100% automatic belt installation. RIA at IV-88, IV-90, J.A. 144, 146.

[37] NHTSA supported its rescission of the standard by noting the reluctance of insurance companies to reduce insurance premiums on cars equipped with automatic belts until those belts had shown their effectiveness. 46 Fed. Reg. at 53,423 ("premium reductions generally are available only to owners of cars equipped with air bags, not automatic belts"). We fail to see how the fact that insurance companies set rates on the basis of experience can be used by NHTSA to evaluate the future effectiveness of a motor safety standard. Moreover, at least one intervenor intends to require the lowering of bodily injury premium levels based only on the introduction of passive restraints. Brief for Intervenor Superintendent of Insurance of the State of New York at 5-6.

as $1,200 when only 10,000 units are produced to as low as $200 when airbags are installed on a fleet-wide basis. *Id.* at VI-10, J.A. 172. Were the agency to analyze an airbags-only standard, the lower cost figures would obviously be the appropriate basis of its analysis.[38] We may therefore not decide on this record that NHTSA's failure to consider airbags alone was irrelevant; indeed, airbags may be significantly cost-effective.[39] That question is for NHTSA to decide, but it has not yet done so. The only reason that can even be *inferred* for NHTSA's silence on this point is that such a standard risks congressional disfavor under the legislative veto provisions of 15 U.S.C. § 1410b. The fact that Congress might veto an airbags-only standard is not a reason for ignoring such a standard; an agency cannot refuse to proceed with reasoned decisionmaking simply because Congress has explicitly stated an intention to review its conclusions at a later time.

3. *Other alternatives*

Other than promising to undertake a campaign to encourage voluntary seatbelt use, the kind of effort that has had dubious effectiveness in the past,[40] NHTSA con-

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[38] Such an analysis might also cause NHTSA to study the cost of airbags more closely. *See* RIA at VI-7, J.A. 169 (Talley Industries, Inc., price estimate of $212 per airbag, including $70 profit for dealer and manufacturer).

[39] *See* text at notes 7-10 *supra*. As late as 1981, NHTSA anticipated that airbags would be placed in "more than 60 percent of new cars." 46 Fed. Reg. at 53,420.

[40] *See, e.g.*, Arnould & Grabowski, *supra* note 33, at 45 ("past efforts along these lines have been extremely unsuccessful"); Comments of Insurance Institute for Highway Safety, May 26, 1981, J.A. 454-56) (poor results of past major promotional campaigns). Moreover, Administrator Peck promised that this campaign "will be undertaken regardless of the outcome of this proceeding" and "is not in any sense viewed as even related much less a substitute for the rulemaking process which is at work here." Transcript of NHTSA hearing, August 5-6, 1981, J.A. 1218-19, 1247A.

sidered no alternatives to the passive restraint standard.[41] Such alternatives abound, from speed controls that might prevent vehicles from obtaining freeway speeds unless seatbelts were fastened to continuous or flashing lights on dashboards. *See* Fed. Reg. 38,380 (Oct. 31, 1974) (recognizing that 1974 Amendment "leaves considerable regulatory discretion concerning warning systems" to replace continuous buzzers).

Although the agency clearly did not have an obligation to consider every such alternative in the course of rescinding Modified Standard 208,[42] the omission of one scheme stands out in particular. As discussed above, *see* pp. 10-11 *supra*, Secretary Coleman also decided that the passive restraint standard should be suspended, but he proposed a demonstration project involving up to 500,000 cars with passive restraints in order to "increase significantly the chances that passive restraints will ultimately prove acceptable [because] I am con-

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[41] The one possible exception is suggested by the comment that retention of Modified Standard 208 might lead to an adverse public reaction that could impair "the ability of States to pass mandatory seat belt use laws." RIA at ii, XI-12, J.A. 22, 272. This observation is ironic, to say the least, because the option of such laws "has consistently ranked last in several public opinion polls." Arnould & Grabowski, *supra* note 33, at 46; *see Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1342 n.22 (both Adams and Coleman considered feasibility of mandatory seat belt laws and "concluded that such statutes could not be enacted in this country"). The explanation for the disfavor with which the American public regards such laws may have been given in note 33 *supra* (interlock requires affirmative action; passive restraints do not).

[42] *See, e.g., Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1171 (D.C. Cir. 1979) (agency head "was not required to meet each separate comment head on when issuing his determination following the comment period," where he did identify the "vital material questions raised during the proceedings and indicate the agency's response to these concerns"); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) ("We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking").

vinced that their potential safety benefits warrant this action." Coleman Decision, J.A. 2074. When Secretary Adams countermanded this decision and issued the mandatory standard in 1977, the debate in Congress focused on the distinction between these two approaches. *See, e.g.*, 123 CONG. REC. 33,325 (1977) (Senator Cannon); *id.* at 33,327 (Senator Griffin); S. REP. NO. 481 (95th Cong., 1st Sess. 31 (1977) (Minority Views) ("the precise issue" is "not whether or not the development and use of air bags should be encouraged. (They should, and they would have been—much sooner, in fact—under former Secretary Coleman's voluntary program)"); H.R. REP. NO. 145, 96th Cong., 1st Sess. 14 (1979) (Supplemental Views) ("We must agree that the wiser and more sensible approach would be to reinstate the Coleman decision"). It is difficult to understand why NHTSA did not reinstate the Coleman decision because that approach is also not discussed in Notice 25. Here too, the agency's rescission of the safety standard without discussing or perhaps even considering obvious alternatives was arbitrary and capricious.

IV. THE NEED FOR A REMAND TO NHTSA

The foregoing analysis illustrates several ways in which NHTSA artificially narrowed its analysis of Modified Standard 208. Although that regulation is a performance standard, the agency offered no evidence that certain technology would fail to perform. More important, it then rescinded the standard without analyzing it in terms of technology that clearly would comply.

By any measure of reasoned decisionmaking, NHTSA's action was arbitrary and capricious. Despite carefully issuing notice on an array of possible changes to Modified Standard 208, NHTSA proceeded as though the only question were whether to implement or rescind the safety standard exactly as that standard was first written five years ago. "It is easy enough for an administrator to

ban everything." *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (FDA regulation concerning smoked whitefish overturned because agency failed to consider formulating rule "with specific parameters that applied to all species of fish"). But "an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (overturning regulation of cable television because record evidence failed to suggest existence of problem at which regulation was aimed). *See, e.g., Sabin v. Butz*, 515 F.2d 1061, 1069 (10th Cir. 1975) (summary judgment in favor of government on whether regulation was arbitrary was precluded by allegation that agency had failed to consider anticompetitive factors); *Pillai v. CAB*, 485 F.2d at 1027-30 (vacating order extending multilateral air carrier rates because agency considered only alternative to be open rates, and thus ignored bilateral negotiations and agency's suspension powers). These cases set aside regulations promulgated without consideration of obvious alternatives, but we see no reason why a different analysis should be applied here to the rescission of a regulation already promulgated. Either form of agency action may at times be irrational.

On balance, it is difficult to find anything positive to say about NHTSA's decisionmaking in this case. After conducting an elaborate quantitative analysis in a 280-page Regulatory Impact Analysis, NHTSA essentially rejected much of this analysis as "hypothetical":

> For purposes of this analysis only, the Agency has again adopted this approach in order to place hypothetical quantitative bounds on benefits and costs. The Agency, for reasons spelled out in detail in the Final Rule, does not accept these hypothetical bounds, and believes that it is not possible to predict with any accuracy what the usage rates of automatic belts would be.

RIA at XI-13, J.A. 273. *See id.* at IV-51, J.A. 107 (emphasizing that extrapolation from existing data "must be understood to be hypothetical"). In other words, the analysis to support Notice 25 has not yet been undertaken. Moreover, several of the explanations stated in Notice 25 fly directly in the face of the agency's own analysis. In stating that the standard would raise equity problems, for example, because current users of manual belts would "subsidize" the nonusers who "will generate all of the benefits that result directly and solely from this regulation," 46 Fed. Reg. at 53,425, NHTSA ignored the fact that high insurance savings could be realized *even by regular users of manual belts.* See RIA at V-1, J.A. 149.[43] It is difficult to avoid the conclusion that NHTSA's analysis in Notice 25 has been distorted by solicitude for the economically depressed automobile industry—which is not the agency's mandate—at the expense of consideration of traffic safety, which is.[44]

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[43] Because insurance companies are unable to tell which car owners consistently use their manual seatbelts, premium discounts are generally given only for vehicles equipped with airbags. *See* note 37 *supra*. *But see* transcript of *NHTSA* hearing, August 5-6, 1981, J.A. 1246 (Nationwide Mutual Insurance Companies has for 10 years offered increased insurance coverage at no additional cost to car owners who state that they use manual belts). Even current users of manual belts could benefit significantly from the lower insurance premiums that could follow implementation of the passive restraint standard. *See* RIA at V-9, J.A. 157 (at 60% usage rates, annual insurance discounts could be $30 per vehicle). Such discounts would cover the marginal cost of automatic belts after three years.

NHTSA also makes the dubious observation that although the Safety Act is "technology-forcing," *see* note 3 *supra*, "[i]t is difficult to conclude that the Vehicle Safety Act is, or in light of past experience could become, a 'people-forcing' statute." 46 Fed. Reg. at 43,426. The very concept of a passive restraint standard is that, unlike interlocks and mandatory seatbelt-use laws, it does *not* "force" safety action. *See* notes 33, 41 *supra*.

[44] *See* text at notes 6-7 *supra* (notice of rulemaking to rescind standard was based at least in part on economic problems of the

We do not hold, of course, that an agency charged with promulgating safety standards may never rescind those regulations once promulgated. But rescission must be supported by rational explanations, after a reasoned and good-faith effort to consider alternative means of advancing the agency's purpose. If Congress chooses, it has the authority to override Modified Standard 208 or any other regulation. *See, e.g.*, 15 U.S.C. § 1410 (exemption from motor vehicle safety standards for manufacturers of 10,000 cars or less for reasons of "substantial economic hardship"). But NHTSA may not confuse its role with that of Congress. Based on the record and the statements in Notice 25, we must conclude that NHTSA has acted capriciously, wearing blinders that prevented it from reasoned evaluation of methods to fulfill the purposes of the Safety Act.

Nature of the Remand

There are obvious problems associated with reversing NHTSA's action, however. Within hours of the issuance of Notice 25—and well before the notice's effective date—the automobile manufacturers began to dismantle their passive restraint programs, and now contend that it would require a minimum of twelve months "following the beginning of the first model year following announcement of the requirement" to restore these programs. MVMA Brief at 70 n.85.[45] Moreover, because of NHTSA's muddy

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automobile industry, and was announced by White House in *Actions to Help the U.S. Auto Industry*); RIA at II-9, J.A. 35 (applying standard to large cars first could have resulted in net income loss of $300 million and employment loss of 13,000 jobs). This observation may not apply to NHTSA's staff, however. *See* State Farm Brief at 19 n.27 (NHTSA Administrator Peck stated at October 23, 1981, press conference that "in some way or another, they all argued to retain the standard").

[45] Although Notice 25 was not effective until December 8, 1981, the automobile manufacturers acted on October 23 and 24. *See* State Farm Brief at 43 n.56 (citing affidavits attached to MVMA Opposition to Stay in November, 1981); NAII Brief at 63 (same).

reasoning in Notice 25, manufacturers would justifiably feel uncertain about the technology that satisfies the performance requirements of Modified Standard 208. *See id.* at 69 n.84. NHTSA has yet to make the case that detachable belts would not comply, although it could make that finding or even require compliance by airbags only. We must therefore decline the suggestions of petitioners that the standard take full effect by September 1983, State Farm Brief at 21, or by September 1982, NAII Brief at 64.

At the same time, we should not simply remand this petition to the agency so that recalcitrance might succeed where rational decisionmaking might not. The implementation of a passive restraint standard has already been delayed without acceptable reasons, perhaps unconscionably so. Our decision does not foreclose rescission, but requires simply that the agency analyze obvious technological alternatives for compliance before doing so. We therefore remand to NHTSA to recommend to us 30 days from today a feasible schedule for completing analysis of these questions. If technological means are found that conform to the performance requirements of the standard such that its safety benefits are economically justified, NHTSA is further instructed to prepare a practical schedule for the implementation of a passive restraint standard.[46] Our order does not, of course, foreclose a reasoned decision by NHTSA that the standard should be suspended or delayed for appropriate reasons, or impede any action that Congress might take to resolve these issues.

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[46] *See MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 346 (D.C. Cir. 1980) (ordering same procedure). As in that case, any party to the proceedings before NHTSA or now before the court shall file with the court any comments on NHTSA's proposed schedule within fifteen days after that schedule is filed with the court by NHTSA. Within fifteen additional days, NHTSA may reply to any of the comments. The court will then either approve, reject, or appropriately modify the schedule, or make such further orders as necessary.

NHTSA is correct in expressing concern about negative public reaction to "an expensive example of ineffective regulation." 46 Fed. Reg. at 53,424. There is no basis on the record before us, however, for concluding that Modified Standard 208 is such a regulation. More important, it is erroneous to believe that "ineffective regulation" occurs only when government acts affirmatively. By rescinding the passive restraint standard without legal justification, NHTSA's arbitrary action presents a paradigm of ineffective regulation. Notice 25 has wasted administrative and judicial resources, and has possibly delayed without justification a safety standard that may be, "from an economic point of view, as important as any environmental, health, or safety rule now on the books."[47] At present rates, 1 in every 60 children born today is expected to die in an automobile accident, and 2 out of every 3 will suffer injuries in a crash. *See* 126 CONG REC. S 13,503 (daily ed. Sept. 25, 1980) (Senator Warner). These figures may be low, for NHTSA concedes that the problem at which the passive restraint standard was aimed has become more urgent in recent years. *See* p. 15 *supra*. But the agency concludes Notice 25 by observing:

> After 12 years of rulemaking, NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits.

46 Fed. Reg. at 53,426. NHTSA may yet conduct the reasoned decisionmaking that can support the rescission of the passive restraint standard, but it may not reject twelve years of preparation for such a standard until it does so. The agency's action here thus represents "an expensive example of ineffective regulation" of the worst kind.

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[47] Comment of William D. Nordhaus, John Musser Professor of Economics at Yale University, May 26, 1981, J.A. 511, 514.

CONCLUSION

NHTSA began this rulemaking because a number of factors had changed since Modified Standard 208 was approved by Congress in 1977. These changed factors—higher gasoline prices, smaller cars, an ailing automobile industry, and the methods of compliance being pursued by that industry—may fully justify reassessing, modifying, and even deferring the effective date of the regulation, decisions that are not before us here. There has been no showing, however, that these changes justify rescinding the standard outright. The explanations put forward in Notice 25 are arbitrary in their failure to address obviously relevant considerations. The rescission of Modified Standard 208 is reversed.

We recognize that sensitive issues are raised in this case. An administrative agency may well require less basis for its decision not to pursue a particular policy at a particular time than when it decides to act affirmatively. But agencies may not ignore the mandate they have received from Congress, and reverse course without a reasoned or rational foundation for doing so. In this regard, we emphasize that courts, administrative agencies, and Congress are partners, not adversaries. Courts do not substitute judgment for that of the agency, but ensure that agencies exercise their judgment only in accordance with the will of Congress.

NHTSA's rescission of Modified Standard 208 cannot be supported on this record. The agency has 30 days in which to submit a schedule for resolving the questions raised in this opinion, leading either to the rescission or suspension of the standard or to a judicially approved schedule for the effective implementation of that standard or an amended standard. If NHTSA finds nonarbitrary reasons for rescinding the standard, of course, its action will be affirmed. Absent such reasons, or intervening action by Congress, NHTSA may not arbitrarily veer from the course that Congress has set.

It is so ordered.

EDWARDS, *Circuit Judge*, concurring: Although I agree with the conclusion in part III of the majority opinion, that "[t]he rescission of Modified Standard 208 on the grounds stated by NHTSA was arbitrary and illogical," maj. op. at 50, I rely principally on the reasons indicated in part III-A. Certain of the observations made in part III-B of the majority opinion appear to be irrefutable, but I do not accept them as a basis for decision in this case. With this one exception, I fully concur in the excellent opinion of Judge Mikva.

By way of emphasis, I think it important to highlight a theme that is implicit throughout the majority opinion. This case involves highly controversial issues that are seen to be critically important to various and competing interest groups. The role of the court is not to write or rewrite Federal Motor Vehicle Safety Standards, or to support a particular interest group, or to weigh alternative solutions to economic problems, or to respond to the political climate of the day. The role of the court—plain and simple—is to enforce the mandate of Congress as expressed in the National Traffic and Motor Vehicle Safety Act and, thus, to determine whether the action of NHTSA reflects "reasoned decisionmaking that is the essence of lawful administrative action." Maj. op. at 5. This judicial role does not change when the court, as here, is confronted with a hotly contested and highly controversial case. The court, thus, does not become a rubberstamp for lawless agency action merely because the questions posed are difficult or sensitive.

As Judge Mikva has so ably indicated in his exhaustive majority opinion, the decision of NHTSA is long on words and short on reasoned decisionmaking. Indeed, the agency decision appears to be nothing more than a determined effort to achieve a particular result without

regard to the facts at hand. Plainly, this is not reasoned decisionmaking, and it cannot be sanctioned by this court.

We express no judgment on the proper outcome of this case and, therefore, we do not seek to substitute our judgment for that of the agency. Rather, as is our responsibility, we reverse here to require the agency to act in accordance with the will of Congress and pursuant to reasoned decisionmaking.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION,
DREW LEWIS, as SECRETARY,
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK,
AUTOMOBILE IMPORTERS OF AMERICA, INC.,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL.,
CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Intervenors

81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS,
AUTOMOBILE OWNERS ACTION COUNCIL, and
EUGENE J. MEYUNG,
Petitioners

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent

AUTOMOBILE IMPORTERS OF AMERICA, INC.,
CONSUMER ALERT and PACIFIC LEGAL FOUNDATION,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL.,
SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK,
Intervenors

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

ORDER

It is ORDERED, by the Court, *sua sponte*, that the schedule for resolving questions, which the Court's opinion herein this date directs respondent Administration to file (see page 76 of slip opinion), shall be filed and served upon counsel of record on or before July 1, 1982.

It is FURTHER ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed June 1, 1982]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF STATE OF NEW YORK, ET AL.,
Intervenors

And Consolidated Case No. 81-2221

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of respondent's (DOT) filing in response to the Court's order entered on June 1, 1982, the comments of petitioners and intervenors in response thereto, and for the reasons set forth in the accompanying memorandum, it is

ORDERED, by the Court, *sua sponte*, that the compliance dates of Federal Motor Vehicle Safety Standard 208, the passive restraint standard, are stayed until September 1, 1983 (Model Year 1984). And it is

FURTHER ORDERED, by the Court, *sua sponte*, that respondent DOT has until October 1, 1982, to advise the Court whether such a compliance date is achievable, or whether a longer period is required, setting forth adequate reasons therefor.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed August 4, 1982]

MEMORANDUM

On June 1, 1982, the Court issued a decision holding that Federal Motor Vehicle Safety Standard 208 had been unlawfully rescinded. The effect of the Court's decision was to restore Standard 208 to the status quo ante litem, as Standard 208 stood on December 7, 1981.

The Court's opinion recognized that DOT had misgivings about particular technology that might be used to comply with Standard 208, specifically the so-called detachable passive seatbelt. Despite DOT's failure in Notice 25 to provide a rational basis for the conclusion that detachable passive seatbelts would not advance the goals of Standard 208, the Court therefore suggested that DOT prepare a schedule for addressing this and other questions raised in the Court's opinion. The Court's opinion also emphasized that even if DOT were lawfully to conclude that detachable passive seatbelts did not advance the goals of Standard 208, additional analysis would still be required before the agency could rescind Standard 208 altogether.

Until that analysis is performed by the agency, however, Standard 208 remains fully in force. The safety standard that was unlawfully rescinded by DOT would have required compliance for large and mid-size automobiles manufactured after September 1, 1982, and for small automobiles manufactured after September 1, 1983. Because of the obvious difficulties created by DOT's unlawful rescission, and in order to accommodate as fully as possible the policies expressed in the statutory scheme as a whole, *see* slip op. at 42 (congressional concern that standard apply to all model sizes simultaneously), the Court in the exercise of its equity powers has stayed the compliance dates for large and mid-size cars until September 1, 1983. DOT has more than 45 days to advise the Court whether the revised compliance dates are achievable. The reporting date of October 1, 1982, does not af-

fect the requirement that automobile makers comply with the standard by September 1, 1983.

The Notice of Proposed Supplemental Rulemaking filed by DOT in response to the Court's order of June 1, 1982, is not inconsistent with the Court's order; at the same time, no party benefits from open-ended DOT decisionmaking, and some dates must be fixed. DOT is free to request additional comments from interested parties, to conduct further regulatory impact analyses, or even to terminate the rulemaking entirely, but additional rulemaking is not required before Standard 208 takes effect. The agency is free to issue orders rescinding or modifying [1] the passive restraint standard, subject to judicial review. The agency is also free, of course, to take its views to Congress, as long as it does not attempt to change the law by administrative fiat.

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[1] Examples of possible modifications include elimination of compliance by means of detachable passive seatbelts, or deletion from the standard of the requirement of passive protection for front center seating positions. *See* slip op. at 56 n.32. Modifications must of course be supported by the reasoned decisionmaking required under law.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

SUPERINTENDENT of INSURANCE of STATE of NEW YORK, ET AL.,
Intervenors

And Consolidated Case No. 81-2221

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of respondent's (DOT) and intervenors' (Consumer Alert, et al.) motions for extension of time in which to file petitions for rehearing and/or rehearing en banc of the Court's decision issued June 1,

1982, of intervenors' (MVMA, et al.) responses, and petitioners' (State Farm, et al.) oppositions in response thereto, and it appearing that the motions for extension of time fail to show the "good cause" required to justify such extension, and for the reasons set forth in the accompanying memorandum, it is

ORDERED, by the Court, that the motions for extension of time in which to file petitions for rehearing and/or rehearing en banc are denied. And it is

FURTHER ORDERED, by the Court, that the period for filing timely petitions for rehearing and/or rehearing en banc having expired, the mandate in the above-captioned case be issued accordingly.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed August 4, 1982]

MEMORANDUM

The Court's decision in the above-captioned case was issued on June 1, 1982, thereby giving the Department of Transportation (DOT) until July 16 to file petitions for rehearing and/or rehearing en banc pursuant to Local Rule 14(a)(1). On July 12, 1982, only four days before this 45-day period was to expire, DOT moved for an extension of time in which to file the aforesaid petitions. The sole basis offered by DOT for its motion concerned the Court's order that the agency propose a schedule for addressing certain questions raised by the Court's decision. DOT suggested: "Until this Court acts on the proposed schedule and the comments filed with respect to that schedule, the extent of judicially imposed obligations on Respondent is unclear." DOT Motion for Extension of Time, July 12, 1982, at 2.

The reason given by DOT does not constitute the "good cause" required by Fed. R. App. P. 26(b) for enlarging the time for filing petitions for rehearing. There is no logical connection between the legal correctness of the Court's decision, that Federal Motor Vehicle Safety Standard 208 was unlawfully rescinded, and "the extent of judicially imposed obligations" now required to ensure that respondent acts in accordance with legislation passed by Congress. The period for filing timely petitions for rehearing expired on July 16, 1982; the mandate of the Court will therefore issue accordingly. This does not, of course, preclude respondent or intervenors from seeking writs of certiorari from the Supreme Court.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

And Consolidated Case No. 81-2221

Before: WALD, MIKVA and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of the motions for stay filed in the above-captioned cases, and of the oppositions and the replies thereto, it is

ORDERED, by the Court, that the aforesaid motions are denied. *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958). It is

FURTHER ORDERED, by the Court, that the briefing and hearing of these cases on the merits shall be expe-

dited; these cases shall be scheduled for argument on the February-March calendar, February 11-March 3, 1982. A briefing schedule shall be established by later order of this Court. It is

FURTHER ORDERED by the Court that the motion of petitioner State Farm Mutual Automobile Insurance Company for oral argument on the motions for stay is denied.

The parties are instructed to address in their briefs the amount of time that will be required by the agency and by the affected automobile manufacturers to take appropriate action in the event that this Court invalidates in whole or in part the agency's rescission order of October 29, 1981.

Per Curiam

Circuit Judge Wald did not participate in the foregoing order.

[Filed December 7, 1981]

APPENDIX E

[46 Fed. Reg. 53419 (October 29, 1981)]

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 74-14; Notice 25]

Federal Motor Vehicle Safety Standards;
Occupant Crash Protection

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Final rule.

SUMMARY: The purpose of this notice is to amend Federal Motor Vehicle Safety Standard No. 208, Occupant Crash Protection, to rescind the requirements for installation of automatic restraints in the front seating positions of passenger cars. Those requirements were scheduled to become effective for large and mid-size cars on September 1, 1982, and for small cars on September 1, 1983.

The automatic restraint requirements are being rescinded because of uncertainty about the public acceptability and probable usage rate of the type of automatic restraint which the car manufacturers planned to make available to most new car buyers. This uncertainty and the relatively substantial cost of automatic restraints preclude the agency from determining that the standard is at this time reasonable and practicable. The reasonableness of the automatic restraint requirements is further called into question by the fact that all new car buyers would be required to pay for automatic belt systems that may induce only a few additional people to take advantage of the benefits of occupant restraints.

The agency is also seriously concerned about the possibility that adverse public reaction to the cost and presence of automatic restraints could have a significant adverse

effect on present and future public acceptance of highway safety efforts.

Under the amended standard, car manufacturers will continue to have the current option of providing either automatic or manual occupant restraints.

DATES: The rescission of the automatic restraint requirements of Standard No. 208 is effective December 8, 1981. Any petitions for reconsideration must be received by the agency not later than December 3, 1981.

ADDRESS: Any petitions for reconsideration should refer to the docket number and notice number of this notice and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Finkelstein, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration, Washington, D.C. 20590 (202-426-1810).

SUPPLEMENTARY INFORMATION: On April 9, 1981, the Department of Transportation published a notice of proposed rulemaking (NPRM) setting forth alternative amendments to the automatic restraint requirements of Standard No. 208 (46 FR 21205). The purpose of proposing the alternatives was to ensure that Standard No. 208 reflects the changes in circumstances since the automatic restraint requirements were issued (42 FR 34289; July 5, 1977) and to ensure that the standard meets the requirements of the National Traffic and Motor Vehicle Safety Act of 1966 and Executive Order 12291, "Federal Regulations" (February 17, 1981).

Background and NPRM

The automatic restraint requirements were adopted in 1977 in response to the high number of passenger car occupants killed annually in crashes and to the persistent low usage rate of manual belts. The manual belt is the

type of belt which is found in most cars today and which the occupant must place around himself or herself and buckle in order to gain its protection. Then, as now, there were two types of automatic restraints, i.e., restraints that require no action by vehicle occupants, such as buckling a belt, in order to be effective. One type is the air cushion restraint (air bag) and the other is the automatic belt (a belt which automatically envelops an occupant when the occupant enters a vehicle and closes the door).

In view of the greater experience with air bags in large cars and to spread out capital investments, the Department established a large-to-small car compliance schedule. Under that schedule, large cars were required to begin compliance on September 1, 1981, mid-size cars on September 1, 1982, and small cars on September 1, 1983.

On April 6, 1981, after providing notice and opportunity for comment, the Department delayed the compliance date for large cars from September 1, 1981, to September 1, 1982. As explained in the April 6, final rule, that delay was adopted

> . . . because of the effects of implementation in model year 1982 on large car manufacturers, because of the added significance which those effects assume due to the change in economic circumstances since the schedule was adopted in 1977, and because of the undermining by subsequent events of the rationale underlying the original phase-in schedule.

Simultaneous with publishing the one-year delay in the effective date for large cars, the Department also issued a proposal for making further changes in the automatic restraint requirements. This action was taken in response to a variety of factors that raised questions whether the automatic restraint requirements represented the most reasonable and effective approach to the problem of low usage of safety belts. Among these factors were the un-

certainty about public acceptability of automatic restraints in view of the absence of any significant choice between automatic belts and air bags and the nature of the automatic belt designs planned by the car manufacturers, the consequent uncertainties about the rate of usage of automatic restraints, and the substantial costs of air bags even if produced in large volumes.

The three principal proposals were reversal of phase-in sequence, simultaneous compliance, and rescission. The reversal proposal would have changed the large-to-small car order of compliance to a requirement that small cars commence compliance on September 1, 1982, mid-size cars on September 1, 1983, and large cars on September 1, 1984. The proposal for simultaneous compliance would have required all size classes to begin compliance on the same date, March 1, 1983. The rescission proposal would have retained the manufacturers' current option of equipping their cars with either manual or automatic restraints.

In addition, the Department proposed that, under both the first and second alternatives, the automatic restraint requirements be amended so that such restraints would not be required in the front center seating position.

Following the close of the period for written comments on the April NPRM, NHTSA decided, in its discretion, to hold a public meeting on the alternatives. The purpose of the meeting was to permit interested parties to present their views and arguments orally before the Administrator and ensure that all available data were submitted to the agency. The notice announcing the meeting indicated that participants at the hearing would be permitted to supplement their previous comments. The notice also urged participants to consider the issues raised in former Secretary Coleman's June 14, 1976 proposal regarding occupant restraints and in former Secretary Adams' March 24, 1977 proposal regarding automatic restraints.

Rationale for Agency Decision

The decision to rescind the automatic restraint requirements was difficult for the agency to make. NHTSA has long pursued the goal of achieving substantial increases in the usage of safety belts and other types of occupant restraints. Former Secretary Adams clearly believed that he had ensured the achievement of that goal in July 1977 when he promulgated the automatic restraint requirements. Now that goal appears as elusive as ever. Instead of being equipped with automatic restraints that will protect substantially greater numbers of persons than current manual belts, most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts. The usage of those automatic belts might, therefore, have been only slightly higher than that of manual belts. While most of the anticipated benefits have virtually disappeared, the costs have not. Vehicle price increases would have amounted to approximately $1 billion per year.

This turn of events may in part reflect the failure of the Department in the years following 1977 to conduct a long term effort to educate the public about the various types of restraints and the need to use them. The need for such an undertaking was seen by former Secretary Coleman in announcing his decision in 1976 to conduct an automatic restraint demonstration project prior to deciding whether to mandate automatic restraints. His instruction that NHTSA undertake significant new steps to promote safety belt usage was never effectively carried out. The result of such an effort could have been that a substantial portion of the public would have been receptive to a variety of automatic restraint designs. As a result of concern over public acceptance, manufacturers have designed their automatic restraints to avoid creating a significant adverse reaction. Unfortunately, the elements of design intended to minimize adverse reaction would also minimize the previously anticipated increases in belt

usage and safety benefits of requiring new cars to have automatic restraints instead of manual belts.

The uncertainty regarding the usage of the predominant type of planned automatic restraint has profound implications for the determinations which NHTSA must make regarding a standard under the National Traffic and Motor Vehicle Safety Act. NHTSA has a duty under the Vehicle Safety Act and E.O. 12291 to review the automatic restraint requirements in light of changing events and to ensure that the requirements continue to meet the criteria which each Federal Motor Vehicle Safety Standard must satisfy. If the criteria cannot be satisfied, the agency must make whatever changes in the standard are warranted. The agency must also have the flexibility to modify its standards and programs in its efforts to find effective methods for accomplishing its safety mission.

The agency believes that the post-1977 events have rendered it incapable of finding now, as it was able to do in 1977, that the automatic restraint requirements would meet all of the applicable criteria in the Vehicle Safety Act. Section 103(a) of the Vehicle Safety Act requires that each Federal Motor Vehicle Safety Standard meet the need for safety and be practicable and objective. Each standard must also be reasonable, practicable and appropriate for each type of vehicle or equipment to which it applies (Section 103(f)(3)). To meet the need for safety, a standard must be reasonably likely to reduce deaths and injuries. To be found practicable, the agency must conclude that the public will in fact avail themselves of the safety devices installed pursuant to the standard (*Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, at 1345-6 (D.C. Cir. 1979)). To be reasonable and practicable, a standard must be economically and technologically feasible, and the costs of implementation must be reasonable. (S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966).)

In reaching the decision announced by this notice, NHTSA has reviewed the enormous record compiled by this agency over the past decade on automatic restraints. Particular attention was paid to the information and issues relating to the notices which the Agency or Department has issued regarding automatic restraints since 1976. All comments submitted in response to the April 1981 proposal by proponents and opponents of the automatic restraint requirements have been thoroughly considered. A summary of the major comments is included as an appendix to this notice. The agency's analysis of those comments may be found in this notice and the final regulatory impact analysis. A copy of the analysis has been placed in the public docket.

Usage of automatic restraints and safety benefits. As in the case of the comments submitted concerning the one-year delay in automatic restraint requirements for large cars, the commenters on the April 1981 proposal expressed sharply divergent views and arguments and reached widely differing conclusions concerning the likely usage rates and benefits of the automatic restraints planned for installation in response to the automatic restraint requirements. The wide distance between the positions of the proponents and opponents of these requirements stems primarily from the lack of any directly relevant data on the most important issue, i.e., the public reaction to and usage rate of detachable automatic belts. These disagreements once again demonstrate the difficulty in reaching reliable conclusions due to the uncertainty created by the lack of adequate data.

In issuing the automatic restraint requirements in 1977, NHTSA assumed that the implementation of those requirements would produce substantial benefits. According to the analysis which NHTSA performed in that year, automatic restraints were expected to prevent 9,000 deaths and 65,000 serious injuries once all cars on the road were equipped with those devices. That prediction was premised

on several critical assumptions. Most important among the assumptions were those concerning the safety benefits of automatic restraints—reductions in death and injury—which in turn are a function of the types of automatic restraints to be placed in each year's production of new cars.

The agency assumed that the combination of air bags and lap belts would be approximately 66 percent effective in preventing fatalities and that automatic belts would have a 50% level of effectiveness. The agency assumed also that air bags would be placed in more than 60 percent of new cars and that automatic belts would be placed in the remaining approximately 40 percent. The agency's analysis predicted that air bags would provide protection in virtually all crashes of sufficient severity to cause deployment of the air bags. It was further assumed that the automatic belts would be used by 60 to 70 percent of the occupants of those cars.

As to public reaction, the agency anticipated that the public would, as a whole, accept automatic restraints because it could choose between the two types of those restraints. Those not wanting automatic belts would select an air bag. Partly as a function of the expected large volume of air bag installation, the agency projected that the cost of air bags would be only slightly more than $100 (in 1977 dollars) more than manual belts.

As part of its efforts to monitor and facilitate implementation of the automatic restraint requirements, the agency continued its gathering of data about the use and effectiveness of air bags and of automatic belts with use-inducing features, the only type of automatic belt available to the public. With respect to automatic belts, this effort was carried out through a contract with Opinion Research Corporation. Under that contract, observations were made of seat belt usage during the two-year period beginning November 1977. These observations provided data on usage of manual and automatic belts in model year

1975-79 VW Rabbits and of manual belts in model year 1978-79 GM Chevettes. As a result of voluntary decisions by VW and GM, a number of the Rabbits and Chevettes were equipped with automatic belts. The observation data showed usage rates of about 36 percent for manual belts and about 81 percent for automatic belts in the Rabbits. The observed rate of manual belt usage in Chevettes was 11 percent. There were insufficient numbers of model year 1978-79 Chevettes equipped with automatic belts to develop reliable usage figures.

Several telephone surveys were also made under contract with Opinion Research. The first survey involved owners of model year 1979 VW Rabbits and GM Chevettes equipped with automatic belts and was conducted during 1979. This survey showed that 89 percent of Rabbit owners and 72 percent of Chevette owners said that they used their automatic belts. A second survey was conducted in late 1979 and early 1980. It covered owners of model year 1980 Rabbits and Chevettes. The usage rates found by the second survey were almost identical to those in the first survey.

Now, however, the validity of the benefit predictions in 1977 and the relevancy of the extensive data gathered by NHTSA on air bags and on automatic belts with use-inducing features have been substantially if not wholly undermined by drastic changes in the types of automatic restraints that would have been installed under the automatic restraint requirements. Instead of installing air bags in approximately 60 percent of new cars, the manufacturers apparently planned to install them in less than 1 percent of new cars. Thus, automatic belts would have been the predominant means of compliance, and installed in approximately 99% of new cars. Thus, the assumed life-saving potential of air bags would not have been realized.

Manufacturers have stated that they chose belt systems for compliance because of the competitive disadvantage of

offering the relatively expensive, inadequately understood air bag when other manufacturers would have been providing automatic belts. These explanations seem credible.

The other drastic change concerns the type of automatic belt to be installed. Although some aspects of the car manufacturers' automatic belt plans are still tentative, it now appears reasonably certain that if the automatic restraint requirements were implemented, the overwhelming majority of new cars would be equipped with automatic belts that are detachable, unlike the automatic belts in Rabbits and Chevettes. Most planned automatic belts would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently.

Again, this design choice would appear to have arisen out of concern that without such features emergency exit could be inhibited, and, in part as a result of a perception of this fact, public refusal to accept new designs would be widespread. The agency shares this concern, and has since 1977 required that all such belts provide for emergency exit. Agency concerns on this point have been validated by recent related attitudinal research discussed below.

In its final rule delaying the initial effective date of the automatic restraint requirements, the April 1981 proposal and the associated documents analyzing the impacts of those actions, NHTSA expressly confronted the lack of usage data directly relevant to the type of automatic belts now planned to be installed in most new cars. The agency stated that there were several reasons why the available data was of limited utility in attempting to make any reliable predictions about the usage of easily detachable automatic belts. The most important reason, which has already been noted, is that the predominant type of planned automatic belt would not have had features to ensure that these belts are not detached.

Second, all of the available data relate to only two subcompacts, the Rabbit and the Chevette. Due to a combina-

tion of owner demographics and a correlation between driver perception of risk and the size of the car being driven, belt usage rates are typically higher in small cars than in larger ones. Therefore, the usage rates for the two subcompacts cannot simply be adopted as the usage rates for automatic belts in all car size classes.

Third, most of the Rabbit and Chevette owners knew that their new car would come with an automatic belt and had it demonstrated for them, even if many state that they did not consciously choose that type of belt. Having voluntarily invested in automatic restraints, they are more likely to use those restraints than someone who is compelled to buy them.

The significance of the fundamental difference between the nondetachable and detachable automatic belt bears further discussion. The Rabbit automatic belts are, as a practical matter, not permanently detachable since they are equipped with an ignition interlock. If the belt is disconnected, the interlock prevents the starting of the car. Each successive use would therefore require reconnection before engine start. The Chevette automatic belts also were initially equipped with an ignition interlock. Beginning in model year 1980, the Chevette belts were made both practically and literally nondetachable. They consist of a continuous, nondetachable shoulder belt. Additional webbing can be played out to produce slack in the belt; however, the belt remains attached at both ends.

By contrast, the automatic belts now planned for most cars do not have any effect on the starting of the cars and are easily detachable. Some belt designs may be detached and permanently stowed as readily as the current manual lap and shoulder belts. Once a detachable automatic belt is detached, it becomes identical to a manual belt. Contrary to assertions of some supporters of the standard, its use thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts. If the car owners perceive the belts as

simply a different configuration of the current manual belts, this stumbling block is likely to remain. They may treat the belt as a manual one and thus never develop the habit of simply leaving the belt attached so that it can act as an automatic belt.

The agency recognizes the possibility that the exposure of some new car purchasers to attached automatic belts may convert some previously occasional users of manual belts to full time belt users. Present attitudinal survey data clearly establish the existence of a population of such occupants who could be influenced by some external factor to convert to relatively constant users. However, the agency believes that many purchasers of new cars having detachable automatic belts would not experience the potential use-inducing character of attached automatic belts unless they had taken the initiative themselves to attach the belts.

Thus, the change in car manufacturers' plans has left the agency without any factual basis for reliably predicting the likely usage increases due to detachable automatic belts, or for even predicting the likelihood of any increase at all. The only tentative conclusion that can be drawn from available data is that the installation of *nondetachable* automatic belts in other subcompacts could result in usage rates near those found in Rabbits and Chevettes. Even that use of the Rabbit and Chevette data may be questionable, however, given the element of voluntarism in the purchase of automatic belts by many of the Rabbit and Chevette owners. Thus, the data on automatic belt use in Rabbits and Chevettes may do little more than confirm the lesson of the model year 1974-75 cars equipped with manual belts and ignition interlocks, i.e., that the addition to a belt system of a feature that makes the belt nondetachable or necessitates its attachment before a car can be started can substantially increase the rate of belt usage.

In estimating automatic belt usage rates for the purposes of the April final rule and proposal, the agency recognized the substantial uncertainty regarding the effects of easily detachable automatic belts on belt usage. NHTSA attempted to compensate for the lack of directly relevant data by using two different techniques to predict a potential range of usage.

One technique was to assume a consistent multiplier effect, whereby belt usage in cars of all size classes would be assumed to be more than slightly double as it had in Rabbits. A doubling of the current 10-11 percent manual belt usage rate projected over the general car fleet would mean a 22 percent rate could be achieved with the installation of automatic belts. The other technique was to assume that there would be a consistent additive effect, whereby the same absolute percentage point increase in belt usage would occur as there had been in the case with Rabbits. Use of this method would result in a predicted 50 percentage point increase in belt usage, over the entire fleet, from the current 10-11 percent to approximately 60 percent.

The agency used the results of these two techniques in an attempt to construct a range of possible increases in belt usage. Thus, a range of 15 to 60 percent was used in both the final regulatory impact analysis for the April rulemaking to defer the effective date for one year and the preliminary analysis for the current action. The figure of 15 percent was derived by doubling the observed 7 percent usage levels in the large type cars affected by the deferral. A figure of 22 percent would have been more appropriate as the low end of the range for the current action, since it would represent a doubling of the current usage rate of the car fleet as a whole. This latter figure has been used in addressing this question in the current final regulatory analysis.

Although the agency had no definitive way of resolving the uncertainty about the usage of detachable automatic

belts, the agency estimated that belt usage with automatic belts would most likely fall near the lower end of either range. This estimate was based on a variety of factors. Most relate to the previously discussed limitations in the relevancy of the observations and surveys of Rabbit and Chevette owners. In addition, those data were on their face inconsistent with data regarding automatic belt usage in crashes involving Rabbits. Those crash data indicated a usage rate of 55-57 percent instead of the better than 80 percent rate indicated by the observation study and telephone surveys.

Thus, the agency made the preliminary judgment in its impact analyses that the switch from manual belts to detachable automatic belts could approximately double belt usage. However, the April 1981 final rule noted that the actual belt usage might be lower, even substantially so. With respect to cars with current low usage rates, that notice stated that the usage rate of detachable automatic belts might only approach levels similar to those currently achieved with manual belts.

The commenters on the April 1981 NPRM did not present any new factual data that could have reduced the substantial uncertainty confronting the agency. Instead, the commenters relied on the same data examined by the agency in its impact analyses.

The commenters were sharply divided on the question of usages rates. Proponents of the automatic restraint requirements did not in their analyses address the significance of the use-inducing nature of the nondetachable automatic belts in the Rabbits and Chevettes or the demographic factors relating to those car purchasers. Instead, they asserted that the usage rates achieved in Rabbits and Chevettes would, with slight adjustments, also be achieved in other car size classes. In reaching this conclusion, they asserted that the usage rate increases of automatic belts shown by Rabbit and Chevette owners were the same regardless of whether the automatic belts

were purchased knowingly or unknowingly. There was an exception to this pattern of comment among the proponents. One public spokesperson for an interest group acknowledged that automatic belts could be designed in a way that they so closely resembled manual belts that their usage rates would be the same.

Opponents of the automatic restraint requirements, relying on the similarity of detachable automatic belts to manual belts, predicted that the automatic belts would not have any substantial effect on belt usage. The opponents of the requirements also dismissed the experience of the Rabbit and Chevette owners on the grounds that the automatic belts in those cars had been voluntarily purchased and were nondetachable.

While the public comments did not provide the agency with any different or more certain basis for estimating belt usage than it already had, they did induce the agency to reexamine its assumption about the possible automatic belt usage rates. Although it is nearly impossible to sort out with precision the individual contributions made by nondetachability, interlocks, car size, demographics and other factors, NHTSA believes that the usage of automatic belts in Rabbits and Chevettes would have been substantially lower if the automatic belts in those cars were not equipped with a use-inducing device inhibiting detachment.

In the agency's judgment, there is a reasonable basis for believing that most of the increase in automatic belt Rabbits and Chevettes is due to the nondetachability feature, whether an interlock or other design feature, of their belt systems. Necessitating the attachment of belts by the addition of interlocks to 1974-75 cars resulted in an increase in manual belt usage by as much as 40 percent in cars subject to that requirement. A similar effect in the case of the Rabbit would account for four-fifths of the increase observed in the automatic belt vehicles. A significant portion of the remaining increase could in fact

be attributable to the fact many owners of automatic belt Rabbits and Chevettes knowingly and voluntarily bought the automatic belts. By the principle of self-selection, these people would be more inclined to use their belts than the purchasers of 1974-75 Rabbits who did not have any choice regarding the purchase of a manual belt equipped with an interlock. This factor would not, of course, be present in the fleet subject to the standard.

The most appropriate way of accounting for the detachability problem and other limitations on the validity of that Rabbit and Chevette data would be to recognize that the levels of usage resulting from both the point estimates are based on uncertain conclusion and adjust each appropriately. The agency's estimate in the final regulatory impact analysis for the April 1981 final rule that usage would likely fall near the lower end of the range had the effect of substantially adjusting downward the usage rate (60 percent) produced by the technique relying on the absolute percentage point increase (50 percentage points) in belt usage in automatic belt Rabbits and Chevettes. A similar adjustment could also be made in the usage rate (15 percent) indicated by the multiplier technique.

Throughout these sequential analyses, the agency has examined the extremely sparse factual data, applied those factors which are known to externally affect usage rates, and defined for analytical purposes the magnitude of potential safety effects. Aside from the initial data points, all such analyses in all cases necessarily involve exercises of discretion and informed judgment. Resultant conclusions are indications of probable usage which always have been and always must be relied upon by the agency in the absence of additional objective data.

The agency believes that the results produced by both techniques must be adjusted to account for the effects of detachability and the other factors affecting usage rates. Therefore, as the April 1981 final rule recognized, the

incremental usage attributable to the automatic aspect of the subject belts may be substantially less than 11 percent.

The agency's analysis of the public comments and other available information leads it to conclude that it cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase. The adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts. Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase.

Thus, the agency concludes that the data on automatic belt usage in Rabbits and Chevettes does not provide a sufficient basis for reliably extrapolating the likely range of usage of detachable automatic belts by the general motoring public in all car size classes. Those data are not even sufficient for demonstrating the likelihood that those belts would be used in perceptibly greater numbers than the current manual belts. If the percentage increase is zero or extremely small due to the substantial similarity of the design and methods of using detachable automatic belts and manual belts, then the data regarding manual belt usage would be as reliable a guide to the effects of detachable automatic belts on belt usage as data regarding usage of nondetachable automatic belts. Indeed, the manual belt data may even be a more reliable guide since the data are based on usage by the general motoring public in cars from all size and demographic classes.

In view of the uncertainty about the incremental safety benefits of detachable automatic belts, it is difficult for the agency to determine that the automatic restraint requirements in their present form meet the need for safety.

In concluding that for this reason detachable automatic belts may contribute little to achieving higher belt usage rates, the question then arises whether the agency should amend the standard to require that automatic belts have a use-inducing feature like that of the Rabbit and Chevette automatic belts. NHTSA believes that such features would increase belt usage. The agency does not, however, believe that such devices should be mandated, for the reasons discussed in detail below.

Costs of automatic restraints. In view of the possibly minimal safety benefits and substantial costs of implementing the automatic restraint requirements, the agency is unable to conclude that the incremental costs of the requirements are reasonable. The requirements are, in that respect, impracticable. While the car manufacturers have already made some of the capital expenditures necessary to comply with the automatic restraint requirements, they still face substantial, recurring variable costs. The average price increase per car is estimated to be $89. The costs of air bags and some designs of automatic belts would be substantially higher. With a total annual production of more than 10 million cars for sale in this country, there would be a price effect of approximately $1 billion.

While the car manufacturers might be able to pass along some or all of their costs to consumers, the necessary price increases would reduce sales. There might not be any net revenue loss since the extra revenue from the higher prices could offset the revenue loss from the lower volume of sales. However, those sale losses would cause net employment losses. Additional sales losses might occur due to consumer uncertainty about or antipathy toward the detachable automatic belts which do not stow so unobtrusively as current manual lap and shoulder belts.

Consumers would probably not be able to recoup their loss of disposable income due to the higher car prices.

There does not appear to be any certainty that owners of cars with detachable automatic belts would receive offsetting discounts in insurance costs. Testimony and written comments submitted to the agency indicate premium reductions generally are available only to owners of cars equipped with air bags, not automatic belts. Some large insurance companies do not now offer discounts to any automatic restraint-equipped cars, even those with air bags. If insurance cost discounts were to be given owners of cars having detachable automatic belts, such discounts would be given only after the automatic belts had produced significant increases in belt usage, and in turn significant decreases in deaths and serious injuries. The apparent improbability of any economic effect approaching the magnitude of the consumer cost means that the discounts would not likely materialize on a general basis.

Insurance company statements at the August 1981 public meeting reaffirmed this belief as they state that they could not now assure reductions in insurance premiums but would have to first collect a considerable amount of claim data.

Finally, the weight added to cars by the installation of automatic belts would cause either increased fuel costs for consumers or further new car price increases to cover the incorporation of offsetting fuel economy improvements.

The agency does not believe that it would be reasonable to require car manufacturers or consumers to bear such substantial costs without more adequate assurance that they will produce benefits. Given the plans of the car manufacturers to rely primarily on detachable automatic belts and the absence of relevant data to resolve the usage question, implementation of the automatic restraint requirements amounts to an expensive federal regulatory risk. The result if the detachable automatic belts fail to achieve significant increases in belt usage could be a substantial waste of resources.

The agency believes that the costs are particularly unreasonable in view of the likelihood that other alternatives available to the agency, the states and the private sector could accomplish the goal of the automatic restraint requirements at greatly reduced cost. Like those requirements, the agency's planned educational campaign is addressed primarily to the substantial portion of the motoring public who are currently occasional users of manual belts.

Effect on public attitude toward safety. Although the issue of public acceptance of automatic restraints has already been discussed as it relates to the usage rate of detachable automatic restraints, there remains the question of the effect of automatic restraints on the public attitude toward safety regulation in general. Whether or not there would be more than minimal safety benefits, implementation of the automatic restraint requirements might cause significant long run harm to the safety program.

No regulatory policy is of lasting value if it ultimately proves unacceptable to the public. Public acceptability is at issue in any vehicle safety rulemaking proceeding in which the required safety equipment would be obtrusive, relatively expensive and beneficial only to the extent that significant portions of the motoring public will cooperate and use it. Automatic belt requirements exhibit all of those characteristics. The agency has given the need for public acceptability of automatic restraints substantial weight since it will clearly determine not only the level of safety benefits but also the general public attitude toward related safety initiatives by the government or the private sector.

As noted above, detachable automatic belts may not be any more acceptable to the public than manual belts at any given point in time. If the detachable automatic belts do not produce more than negligible safety benefits, then regardless of the benefits attributable to the small

number of other types of automatic restraints planned to be installed, the public may resent being required to pay substantially more for the automatic systems. Many if not most consumers could well conclude that the automatic belts would in fact provide them with no different freedom of choice about usage or levels of protection than manual belts currently offer. As a result, it is not unreasonable to conclude that the public may regard the automatic restraint requirements as an expensive example of ineffective regulation.

Thus, whether or not the detachable automatic belts might have been successful in achieving higher belt usage rates, mandates requiring such belts could well adversely affect public attitude toward the automatic restraint requirements in particular and safety measures in general. As noted in more detail in the 1976 Decision of Secretary Coleman.

> Rejection by the public would lead to administrative or Congressional reversal of a passive restraint requirement that could result in hundreds of millions of dollars of wasted resources, severe damage to the nation's economy, and, equally important, a poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future.

It can only be concluded that the public attitude described by the Secretary at that time is at least as prevalent today. The public might ultimately have sought the legislative rescission of the requirements. Action-forcing safety measures have twice before been overturned by Congress. In the mid-1970's, Congress rescinded the ignition interlock provision and provided that agency could not require the States to adopt and enforce motorcycle helmet use laws. Some people might also have cut the automatic belts out of their cars, thus depriving subsequent owners of the cars of the protection of any occupant restraint system. These are serious concerns for an agency charged by statute with taking steps appropriate

for addressing safety problems that arise not only in the short term but also the long term. The agency must be able to react effectively to the expected increases in vehicle deaths and injuries during the 1980's.

Equity. Another relevant factor affecting the reasonableness of the automatic restraint requirements and of their costs is the equity of the distribution of such costs among the affected consumers. Responsible regulatory policy should generally strive to ensure that the beneficiaries of regulation bear the principal costs of that regulation. The higher the costs of a given regulation, the more serious the potential equity problem. The automatic restraint requirements of the standard would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint usage.

Option of Adopting Use-Compelling Features. As noted above, some commenters have suggested that the only safety belts which are truly "passive" are those with use-compelling features. Such commenters have recommended that the agency amend the standard so as to require such features. For example, an ignition interlock which prohibits the car from starting unless the belt is secured is a use-compelling feature. Another example is a passive belt design which is simply not detachable, because no buckle and latch release mechanism is provided. While NHTSA agrees that such use-compelling features could significantly increase usage of passive belts, NHTSA cannot agree that use-compelling features could be required consistent with the interests of safety. In the case of the ignition interlock, NHTSA clearly has no authority to require such a use-compelling feature. The history of the Congressional action which removed this authority from NHTSA suggests that Congress would look with some

disfavor upon any similar attempt to impose a use-compelling feature on a belt system.

But, even if NHTSA were to require that passive belts contain use-compelling features, the agency believes that the requirement could be counterproductive. Recent attitudinal research conducted by NHTSA confirms a widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash. Such apprehensions may well be contributing factors in decisions by many people not to wear a seat belt at all. This apprehension is clearly a question which can be addressed through education, but pending its substantial reduction, it would be highly inappropriate to impose a technology which by its very nature could heighten or trigger that concern.

In addition, the agency believes there are compelling safety reasons why it should not mandate use-compelling features on passive belts. In the event of accident, occupants wearing belts suffer significantly reduced risk of loss of consciousness, and are commonly able to extricate themselves with relative ease. However, the agency would be unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would. NHTSA's regulations properly recognize the need for all safety belts to have some kind of release mechanism, either a buckle and latch mechanism or a spool-out release which feeds a length of belt long enough to extricate a car occupant.

Alternative methods of increasing restraint usage. Finally, the agency believes that it is possible to induce increased belt usage, and enhance public understanding and awareness of belt mechanisms in general, by means that are at least as effective but much less costly than the installation of millions of detachable automatic belts.

In the decision noted above, Secretary Coleman noted the obligation of the Department of Transportation to un-

dertake efforts to encourage the public to use occupant restraints, active or passive. Toward this point, Secretary Coleman directed the Administrator of NHTSA to undertake significant new steps to promote seat belt usage during the demonstration program. This instruction of the Secretary was not effectively carried out and unfortunately, we do not enjoy today the benefits of a prolonged Departmental campaign to encourage seat belt usage. Had such a program been successfully carried out, increased seat belt usage could have saved many lives each year, beginning in 1977.

Rather than allowing the Coleman demonstration program and its accompanying education effort to come to fruition, the Department reconsidered Secretary Coleman's 1976 decision during 1977. At the conclusion of the reconsideration period, the Department reversed that decision, and amended the standard to require the provision of automatic restraints in new passenger cars, in accordance with a phased-in schedule.

The benefits of any such belt use enhancement efforts could have already substantially exceeded those projected for the automatic restraint requirements of this standard. Over the next ten years, the requirements of the standard would have addressed primarily those occasional belt users amenable to change who buy new cars during the mid and late 1980's.

Prior to the initiation of rulemaking in February of this year, the Department had resolved to undertake a major educational effort to enhance voluntary belt usage levels. Such efforts will be closely coordinated with new and preexisting major initiatives at the State level and in the private sector, many of which were discussed at the public meeting on the present rulemaking. These efforts will address not only those users/purchasers amenable to change, but also those currently driving and riding in cars, multipurpose passenger vehicles and trucks on the road today. The potential for immediate impact is thus

many times greater. Further, with the much greater number of persons directly impacted, educational efforts would need to raise safety belt usage in the vehicles on the road during the 1980's by only a few percentage points to achieve far greater safety benefits than the automatic restraint requirements could have achieved during the same time period.

This is in no sense to argue or suggest that non-regulatory alternatives are or should be considered in all cases appropriate to limit Federal regulation. However, the existence of such efforts, and their relevance to calculations of benefits in the present case, must be and has been considered to the extent discussed herein.

Summary of Agency Conclusion

As originally conceived, the automatic restraint requirement was a far reaching technology forcing regulation that could have resulted in a substantial reduction in injuries and loss of life on our highways.

As it would be implemented in the mid-1980's, however, the requirement has turned into a billion dollar Federal effort whose main technological advance would be to require seat belts that are anchored to the vehicle door rather than the vehicle body, permitting these belts to be used either as conventional active belts or as automatic belts.

To gain this advantage, under the standard as drafted, consumers would see the end of the six passenger car and an average vehicle price increase on the order of $89 per car. The almost certain benefits that had been anticipated as a result of the use of air bag technology have been replaced by the gravely uncertain benefit estimates associated with belt systems that differ little from existing manual belts.

In fact, with the change in manufacturers' plans that in essence replaced air bags with automatic belts, the

central issue in this proceeding has become whether automatic belts would induce higher belt usage rates than are occurring with manual belts.

Many of the comments in the course of this rulemaking were directed specifically at the question of belt use. Most addressed themselves to the information in the docket on the usage witnessed in the VW Rabbit and Chevette equipped with automatic belts.

The agency's own analysis of the available information concludes that it is virtually impossible to develop an accurate and supportable estimate of future belt use increases based upon the Rabbit and Chevette automatic belt observations. The agency further believes that it is impossible to disaggregate the roles that demographics, use-inducing devices, and automatic aspects of the belt played in the observed increases.

Faced with this level of uncertainty, and the wide margins of possible error, the agency is simply unable to comply with its statutory mandate to consider and conclude that the automatic restraint requirements are at this time practicable or reasonable within the meaning of the Vehicle Safety Act. On the other hand, the agency is not able to agree with assertions that there will be absolutely no increase in belt use as a result of automatic belts. Certainly, while a large portion of the population appears to find safety belts uncomfortable or refuses to wear them for other reasons, there is a sizeable segment of the population that finds belts acceptable but still does not use them. It is plausible to assume that some people in this group who would not otherwise use manual belts would not disconnect automatic belts.

It is this same population that will generate all of the benefits that result directly and solely from this regulation. This is a population that can also be reached in other ways. The Agency, state governments and the private sector are in the process of expanding and initiat-

ing major national belt use educational programs of unprecedented scale. While undertaken entirely apart from the pending proceeding, the fact remains that this effort will predominantly affect the same population that the automatic belts would be aimed at.

On the one hand, it could be argued that the success of any belt use program would only be enhanced by the installation of automatic belts. Individuals who can be convinced of the utility of safety belts would presumably have an easier time accepting an automatic belt. On the other hand, there is little evidence that the standard itself will materially increase usage levels above those otherwise achievable.

However, the agency is not merely faced with uncertainty as to the actual benefits that would result from detachable automatic safety belts. When the uncertain nature of the benefits is considered together with the risk of adverse safety consequences that might result from the maintenance of this regulation, the agency must conclude that such retention would not be reasonable, and would not meet the need for motor vehicle safety.

It is useful to summarize precisely what the agency believes these risks might be. The principal risk is that adverse public reaction could undermine the effectiveness of both the standard itself and future or related efforts.

The agency also concludes, however, that retention would present serious risk of jeopardizing other separate efforts to increase manual belt usage by the Federal government, States and the private sector. A public that believes it is the victim of too much government regulation by virtue of the standard might well resist such parallel efforts to enhance voluntary belt usage. Further, to the extent that States begin to consider belt use laws as an option, a Federal regulation addressing the same issue could undermine those attempts as well.

While one cannot be certain of the adverse effects on net belt usage increases, it would be irresponsible to fail to

consider them. A decision to retain the regulation under any of the schedules now being considered would not get automatic belts on the road until 1983 and would not apply to the entire fleet of new cars until 1984. By the end of the 1984 model year, under most options, there would have been fewer than 20 million vehicles equipped with automatic belts on the road.

By the same time, however, there will be upward of 150 million vehicles equipped with only manual belts, drivers and occupants of which will have been exposed to interim belt usage encouragement efforts.

Agency analysis indicates that external efforts of whatever kind that increase usage by only 5 percent, will save more than 1300 lives per year beginning in 1983. Installation of automatic belts could save an equal number of lives in 1983 only with 95 percent belt usage.

Further, even if one is convinced that automatic belts can double belt usage and alternative efforts would only increase usage by 5 percent, it would not be until 1989 that total life savings attributable to automatic belts installed under the automatic restraint requirements would reach the total life savings achieved through such other efforts.

NHTSA fully recognizes that neither outcome is a certainty. Much closer to the truth is that both outcomes are uncertain. However, neither is significantly more likely than the other. That being the case, to impose the $1 billion cost on the public does not appear to be reasonable.

It is particularly unreasonable in light of the fact that the rescission does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize. Long before there would have been any substantial number of vehicles on the road mandatorily equipped with automatic belts as a result of this standard, NHTSA will conclusively know whether other efforts to increase belt use have succeeded

either in achieving acceptable usage levels or in increased public understanding and acceptance of the need for further use-inducing or automatic protection alternatives. If so, obviously no further action would be needed. If such is not the case, rulemaking would again be a possibility. Any such rulemaking, following even partially successful efforts to increase belt use, would be much less likely to face public rejection.

It has been said that the Vehicle Safety Act is a "technology-forcing" statute. The agency concurs completely.

However, the issue of automatic restraints now before the agency is not a "technology-forcing" issue. The manual seat belt available in every car sold today offers the same, or more, protection than either the automatic seat belt or the air bag. Instead, the agency today faces a decision to force people to accept protection that they do not choose for themselves. It is difficult to conclude that the Vehicle Safety Act is, or in light of past experience could become, a "people-forcing" statute.

NHTSA cannot find that the automatic restraint requirements meet the need for motor vehicle safety by offering any greater protection than is already available.

After 12 years of rulemaking, NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits. The agency is still committed to this goal and intends immediately to initiate efforts with automobile manufacturers to ensure that the public will have such types of technology available. If this does not succeed, the agency will consider regulatory action to assure that the last decade's enormous advances in crash protection technology will not be lost.

Impact Analyses

NHTSA has considered the impacts of this final rule and determined that it is a major rulemaking within the

meaning of E.O. 12291 and a significant rule within the meaning of the Department of Transportation regulatory policies and procedures. A final regulatory impact analysis is being placed in the public docket simultaneously with the publication of this notice. A copy of the analysis may be obtained by writing to: National Highway Traffic Safety Administration, Docket Section, Room 5109, 400 Seventh Street, S.W., Washington, D.C. 20590.

The agency's determination that the rule is major and significant is based primarily upon the substantial savings in variable manufacturing costs and in consumer costs that result from the rescission of the automatic restraint requirements. These costs would have amounted to approximately $1 billion once all new cars became subject to the requirements. The costs would have recurred annually as long as the requirements remained in effect. There is also a recurring savings in fuel costs of approximately $150 million annually. Implementation of the automatic restraint requirements would have increased the weight of cars and reduced their fuel economy. In addition, the car manufacturers will be able to reallocate $400 million in capital investment that they would have had to allocate for the purpose of completing their efforts to comply with the automatic restraint requirements.

The agency finds it difficult to provide a reliable estimate of any adverse safety effects of rescinding the automatic restraint requirements. There might have been significant safety loss if the installation of detachable automatic belts resulted in a doubling of belt usage and if the question were simply one of the implementation or rescission of the automatic restraint requirements. The April 1981 NPRM provided estimates of the additional deaths that might occur as a result of rescission. However, those estimates included carefully drafted caveats. The notice expressly stated that the impacts of rescission would depend upon the usage rate of automatic belts and the effectiveness of the agency's educational campaign.

The agency has now determined that there is no certainty that the detachable automatic belts would produce more than a several percentage point increase in usage. The small number of cars that would have been equipped with automatic belts having use-inducing features or with air bags would not have added more than several more percentage points to that amount. Further, any potential safety losses associated with the rescission must be balanced against the expected results of the agency's planned educational program about safety belts. That campaign will be addressed to the type of person who might be induced by the detachable automatic belts to begin regular safety belt usage, i.e., the occasional user of manual belts. Since that campaign will affect occasional users in all vehicles on the road today instead of only those in new cars, the campaign can yield substantially greater benefits than the detachable automatic belts even with a much lower effectiveness level.

The agency has also considered the impact of this action on automatic restraint suppliers, new car dealers and small organizations and governmental units. Since the agency certifies that the rescission would not have a significant effect on a substantial number of small entities, a final regulatory flexibility analysis has not been prepared. However, the impacts of the rescission on the suppliers, dealers and other entities are discussed in the final Regulatory Impact Analysis.

The impact on air bag manufacturers is likely to be minimal. Earlier this year, General Motors, Ford and most other manufacturers cancelled their air bag programs for economic reasons. These manufacturers planned instead to rely almost wholly on detachable automatic belts. Thefore, it is not accurate to say, as some commenters did, that rescission of the automatic restraint requirements will "kill" the air bag. Rescission will not affect the air bag manufacturers to any significant degree. Further, the agency plans to undertake new

steps to promote the continued development and production of air bags.

The suppliers of automatic belts are generally the same firms that supply manual belts. Thus, the volume of sales of these firms is not expected to be affected by the rescission. However, there will be some loss of economic activity that would have been associated with developing and producing the more sophisticated automatic belts.

The effects of the rescission on new car dealers would be positive. Due to reduced new car purchase prices and more favorable reaction to manual belts than to automatic belts, sales increases of 395,000 cars were estimated by GM and 235,000 cars by Ford. While these figures appear to be overstated, the agency agrees that rescission will increase new car sales.

Small organizations and governmental units would be benefited by the reduced cost of purchasing and operating new cars. Given the indeterminacy of the usage rate that detachable automatic belts would have achieved, it is not possible to estimate the effects, if any, of the rescission on the safety of persons employed by these groups.

In accordance with the National Environmental Policy Act of 1969, NHTSA has considered the environmental impacts of the rescission and the alternatives proposed in the April 1981 NPRM. The option selected is disclosed by the analysis to result in the largest reductions in the consumption of plastics, steel, glass and fuel/energy. A Final Environmental Impact Statement is being placed in the public docket simultaneously with the publication of this notice.

This amendment is being made effective in less than 180 days because the date on which the car manufacturers would have to make expenditure commitments to meet the automatic restraint requirements for model year 1983 falls within that 180-day period.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

In consideration of the foregoing, Federal Motor Vehicle Safety Standard No. 208, *Occupant Crash Protection* (49 CFR 571.208), is amended as set forth below.

§ 571.208 [Amended]

1. S4.1.2 is amended by revising it to read:

S4.1.2 *Passenger cars manufactured on or after September 1, 1973.* Each passenger car manufactured on or after September 1, 1973, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

2. The heading of S.4.1.2.1 is amended by revising it to read:

S4.1.2.1 *First option — Frontal/Angular Automatic protection system.*

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S.4.1.3 [Removed]

3. S4.1.3 is removed.

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 Stat. 1392, 1407); delegation of authority at 49 CFR 1.50)

Issued on October 23, 1981.

Raymond A. Peck, Jr.,

Administrator.

APPENDIX

Editorial

Note.—This appendix will not appear in the Code of Federal Regulations.

Following is a summary of the major comments submitted in response to the April 9, 1981 notice of proposed rulemaking. A more detailed summary of comments has been placed in NHTSA Docket No. 74-14; Notice 22. This summary is organized in broad terms according to the interest groups from which the comments were received.

Insurance Companies

All commenting insurance companies strongly favored retention of the automatic restraint requirements. Many favored maintaining the present implementation schedule (i.e., September 1, 1982, for large and medium-sized cars and September 1, 1983, for small cars), although several companies stated they would support a change to require that small cars are phased in first or a simultaneous implementation date. Several insurance companies stated that air bags offer the best technology for saving lives and reducing injuries. These companies pointed out that repeated surveys have indicated that consumers appear to favor air bags, even if higher costs are likely. Several insurers argued that a retreat from the standard represents a breach of the Secretary's statutory obligation to reduce traffic accidents and deaths and injuries which result from them. One company argued that a delay in the standard (i.e., the delay and reversal alternative) would produce no measurable economic benefit to car makers and might possibly result in an economic loss to them. Nearly all the companies argued that the standard is cost-beneficial and represents the optimum approach to resolving this country's most pressing public health problem. Many companies stated that reduced insurance premiums resulting from the lives saved and injuries pre-

vented by automatic restraints would help offset the cost of those systems to consumers.

A majority of the insurance companies argued that seat belt use campaigns will not be effective in raising the current use rate of manual belts significantly. The companies pointed to the failures of all past campaigns to have any substantial impact on use rates. On the other hand, these companies believe that the use rate of automatic belts will be significant. The companies point to the current use data for automatic belts on VW Rabbits and Chevettes as evidence that automatic belt use will be significant. The companies believe that seat belt use campaigns should only be complimentary to automatic restraints, not a substitute.

Several insurance companies pointed to the huge economic losses resulting from traffic accidents. One company stated that these losses amount to over 1 billion dollars per year and result in recurring costs because of continuing medical problems such as epilepsy and quadriplegia. One company cited Professor William Nordhaus's analysis of the consequences of rescinding the standard as being equivalent to society's loss if the tuberculosis vaccine had not been developed, or if Congress repealed the Clean Air Act. In his submission on behalf of the insurance companies, Professor Nordhaus stated that fatalities will increase by 6,400 each year and injuries by 120,000 if the standard is rescinded. One company argued that the standard is cost-beneficial if automatic belt use rates increase usage only 5 percent. However, this company stated that use rates as high as 70 percent could be expected, and that the costs of rescinding the standard could reach as much as 2 billion dollars per year. This company also argued that the economic condition of the vehicle inindustry is no excuse for any delay in the standard and is not a statutorily justified reason for rescinding the standard.

Consumer Groups and Health Organizations

There were many consumer groups and health-related organizations which strongly urged that the automatic restraint requirements be maintained and that there be no further delays in the implementation schedule. Most of these groups argued that the costs of both air bags and automatic belts are greatly exaggerated by vehicle manufacturers. One group stated that the three alternative proposals are "naive and exhibit a callous disregard for human lives that flouts the agency's mandated safety mission." This group argued that a worst alternative is to rescind the standard and rely on education programs to increase the use of manual belts, since seat belt campaigns have failed repeatedly in this country. The group stated that the simultaneous implementation alternative in March 1983 ignores the industry's background of introducing safety changes only at the beginning of a new model year. Regarding a reversed phase-in schedule, the group stated that the requirement that small cars have automatic restraints by September 1, 1982, would not likely provide sufficient lead time for small car manufacturers. Additionally, with approximately 2 to 1 difference in seat belt use in small cars versus larger cars, it is not at all clear that the proposed reversal would make up for the delay in implementation in the larger cars in terms of lives saved. The group argued that the best alternative is to maintain the existing implementation schedule.

Several consumer groups argued that the center seating position should not be eliminated from the requirements for several reasons. First, they argued, this position is likely to be occupied by children. Second, the center seat requirement is one factor that will lead to the installation of air bags in some vehicles since current automatic belt designs cannot be applied to the center seat. Nearly all consumer groups argued that benefits of the automatic restraint standard far outweigh the costs.

One association stated that the air bag supplier industry could be forced out of business if substantial modifications and further delays are made to the standard. This would mean, the association argued, that the life-saving air bag technology could be lost forever. The association would support some modifications to the standard if there were some clear commitment by the Department that some car models would be required to offer the consumer the choice of air bags. The group noted that air bag suppliers have indicated that a sufficient production volume would result in air bag systems priced in the 200 to 300 dollar range.

Various health groups and medical experts argued that the pain and suffering resulting from epilepsy and paraplegia, as well as mental suffering and physical disfigurement, could be greatly reduced by the automatic restraint standard. These persons argued that the standard should be implemented as soon as possible.

One consumer oriented group did not support the automatic restraint standard. That foundation argued that the standard is not justified, particularly if it is complied with by means of air bags. The group stated that air bag effectiveness is overestimated since the agency does not include non-frontal crashes in its statistics. The organization argued that in many situations air bags are actually unsafe. This group also argued that the public acceptability of automatic seat belts is uncertain, and that a well-founded finding of additional safety benefits by the Department is required in order to justify retention of the standard.

Vehicle Manufacturers

The vehicle manufacturers, both foreign and domestic, were unanimously opposed to retention of the automatic restraint standard. Most manufacturers stated the predominate means of complying with the standard would be with automatic belts, and that such belts are not likely to

increase usage substantially. This is because most automatic belts will be designed to be easily detachable because of emergency egress considerations and to avoid a potential backlash by consumers that would be counterproductive to the cause of motor vehicle safety. The domestic manufacturers argued that the public would not accept coercive automatic belts (i.e., automatic belts with interlocks or some other use-inducing feature). Eliminating any coercive element produces, in effect, a manual belt, which will be used no more than existing manual systems.

The domestic manufacturers also argued that air bags would not be economically practicable and would, therefore, be unacceptable to the public. One manufacturer noted that current belt users will object strenuously to paying additional money for automatic belts that will not offer any more protection than their existing belts.

One manufacturer argued that the injury criteria specified in the standard is not representative of real injuries and should be replaced with only static test requirements for belt systems. The company argued that there are many problems with test repeatability under the 208 requirements.

All manufacturers of small cars stated that it would be impossible for them to comply with the standard by September 1, 1982, i.e., under the reversal proposal. These manufacturers stated that there is insufficient lead time to install automatic restraints in small cars by that date, and several foreign manufacturers stated they would not be able to sell their vehicles in that model year if the schedule is reversed. Most of the manufacturers, both domestic and foreign, stated that it is also too late to install automatic restraints in their small cars even six months earlier than the existing schedule, i.e., under the March 1983 simultaneous implementation proposal. Many manufacturers supported a simultaneous implementation if the standard is not rescinded, but requested that the

effective date be September 1, 1983, or later. The manufacturers argued that an effective date for small cars prior to September 1, 1983, would not allow enough time to develop acceptable, reliable and high quality automatic belts.

Nearly all vehicle manufacturers believe that an intensive seat belt education campaign can be just as effective as automatic restraints and without the attendant high costs of automatic restraints. Additionally, most foreign manufacturers recommended that mandatory seat belt use laws be enacted in lieu of automatic restraints.

One foreign manufacturer requested that any effective date for automatic restraints be "September 1 or the date of production start of the new model year if this date falls between September 1 and December 31". The company stated that this would allow manufacturers to continue production for several months of models that would then be phased out of production. However, a domestic vehicle manufacturer argued that this would give foreign manufacturers an unfair competitive advantage, and that current practice of September 1 effective dates should be retained.

Most manufacturers supported the proposal to exclude the center seating position from the automatic restraint requirements, in order to give manufacturers more design flexibility. However, the two domestic manufacturers which would be most affected by such an exception stated that it is too late for them to make use of such an exception for 1983 models. The two companies stated that such an exception would have benefits in the long run, however, and would allow them to continue production of six-seat passenger cars in the mid-1980's.

Suppliers and Trade Groups

Suppliers of air bag system components supported continuation of the automatic restraint requirements. One commenter stated that having to buckle-up is an act which

requires a series of psychological and physical reactions which are responsible for the low rate of manual seat belts. Also, this company stated that educational campaigns to increase belt use will not work.

One motor vehicle trade group stated that a study by the Canadian government has established the superiority of manual seat belt systems. This group argued that the automatic restraint requirements cannot be justified because any expected benefits are speculative.

One trade group voiced its concern about sodium azide (an air bag propellant) as it pertains to possible hazards posed to the scrap processing industry.

A group representing seat belt manufacturers stated that the most effective way of guaranteeing belt use is through mandatory belt use laws. That group believes that belt usage can be increased through public education, and that simple, easy to use automatic belts such as are currently on the VW Rabbit will also increase belt usage. This group did not support a simultaneous implementation date for automatic restraints, stating that this could put a severe strain on the supplier industry. The group did support elimination of the automatic restraint requirements for center seating positions.

An automobile association recommended equipping small cars with automatic restraints first. The association stated that a reversed phase-in schedule would protect a significantly large segment of the public at an earlier date, would reduce a foreign competitive advantage (under the existing schedule), and would give needed economic relief to large car manufacturers. This organization also recommended that, as an alternative, automatic restraints be required only at the driver's position. This would achieve three-quarters of the reductions in deaths and serious injuries now projected for full-front seat systems, yet cost only half as much.

Congressional Comments

Mr. Timothy E. Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance, made the following comments:

—The automatic restraint requirements would produce benefits to society far in excess of costs.

—The Committee findings strongly point to the necessity of requiring the installation of automatic crash protection systems, at a minimum, on a substantial portion of the new car fleet at the earliest possible date. Mr. Wirth suggested that the effective date for small cars be September 1, 1982, and for intermediate and large cars September 1, 1983.

—The economic conditions of the automobile industry should not be relevant to the NHTSA's decision on matters of safety. NHTSA's decision must be guided solely by safety-related concerns.

—The agency should not discount its own findings indicating high use of automatic belts (referring to the existing VW and Chevette automatic belt use data).

In a joint letter to the Secretary, eighteen Congressmen urged that the automatic restraint requirements be maintained. This letter noted that over 50,000 people are killed each year on the highways and stated: "While the tragedy of their deaths cannot be measured in economic terms, the tragedy of their serious injuries cost all of us billions of dollars each year in higher insurance costs, increased welfare payments, unemployment and social security payments and rehabilitation costs paid to support the injured and the families of those who have been killed." The letter stressed the Congressmen's belief that the automatic crash protection standard would produce benefits to society far in excess of its cost.

In a letter addressed to Administrator Peck, fifty-nine Congressmen urged that the automatic restraint standard

be rescinded. That letter stated: "The 208 standard persists as one of the more controversial federal regulations to be forced on the automobile industry. . . . The industry continues to spend hundreds of thousands of dollars every day in order to meet this standard, despite considerable evidence that any safety benefits realized by enforcing the standard woud be minimal."

Private Citizens

In addition to comments from the above groups and organizations, the agency also received general comments from numerous private citizens. These comments were almost equally divided in their support or opposition to the automatic restraint standard.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent.

NOTICE OF FILING

Pursuant to this Court's June 1, 1982 opinion (Slip Op. at 76), the Respondent Administrator of the National Highway Traffic Safety Administration intends to publish the attached notice of proposed supplemental rulemaking in the Federal Register. The notice sets forth the Respondents' "schedule for resolving the questions raised in [the Court's] opinion." *Id.* The notice is being filed solely to comply with and meet the deadline imposed by the Court's opinion, and is done without prejudice to, and does not reflect a decision with respect to, the Respondents' rights to seek rehearing, rehearing *en banc* and/or a writ of certiorari from the Supreme Court.

Respondents continue to believe that rescission of provisions of Federal Motor Vehicle Safety Standard No. 208, requiring all manufacturers of new cars to install automatic restraint systems, is in all respects proper and lawful, and supported by evidence in the record. The reasons for the recission are fully articulated in the Preamble to the Respondent Administrator's Order of October 23, 1981.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

/s/ Michael F. Hertz
MICHAEL F. HERTZ
(202) 633-3180
Appellate Litigation Counsel
Civil Division
Department of Justice
Washington, D.C. 20530

Of Counsel:
FRANK BERNDT
Chief Counsel
STEPHEN P. WOOD
Assistant Chief Counsel
DAVID W. ALLEN
Assistant Chief Counsel
HUGH F. OATES
EILEEN T. LEAHY
SHIRLEY RANSOM
Attorneys
National Highway Traffic Safety
Administration
Department of Transportation
Washington, D.C. 20590

[Filed July 1, 1982]

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 74-14; Notice 28]

Federal Motor Vehicle Safety Standards;
Standard No. 208, Occupant Crash Protection

AGENCY: National Highway Traffic Safety Administration (NHTSA).

ACTION: Notice of proposed supplemental rulemaking.

SUMMARY: This notice of proposed supplemental rulemaking is issued pursuant to the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *State Farm Mutual Automobile Insurance Co., et al.* v. *Department of Transportation, et al.* (D.C. Cir. No. 81-2220; consolidated with No. 81-2221; filed in NHTSA rulemaking docket as 74-14, N25-029). That case involves the judicial review of an order issued by the NHTSA Administrator rescinding the provisions of Federal Motor Vehicle Safety Standard No. 208 which required all manufacturers of new cars to install automatic restraint systems in those vehicles. The opinion and order of the Court of Appeals reversed the Administrator's order, but also denied the petitioners' requests to reinstate the effective dates of the automatic restraint requirement. Instead, the Court required the agency to conduct further proceedings pursuant to its direction.

The Department continues to believe that the decision to rescind the automatic restraint requirement of FMVSS No. 208 was not arbitrary and capricious, and that the Court committed reversible error in reversing that decision. This notice, however, sets forth NHTSA's plans for conducting additional proceedings relating to the rescission of the automatic restraint requirement of FMVSS No. 208.

In an attempt to respond to the Court's concerns, NHTSA seeks the comments of all interested parties on questions raised by the Court's opinion. Specifically, NHTSA seeks comments relating to the predicted usage of detachable automatic belts lacking use-compelling devices under the automatic restraint requirement, and regulatory alternatives such as amending the standard to require all automatic belts be nondetachable or to limit means of compliance to air bags only. Comments on these issues should be directed to possible rescission of the automatic restraint requirement, or, alternatively, to suspension of the automatic restraint requirement and/or adoption of a voluntary program of automatic restraints.

DATES: Comments are due 30 days after publication of this notice in the FEDERAL REGISTER. NHTSA will consider all comments and as soon as possible after the comment closing date issue any appropriate supplemental decision. Every effort will be made to complete this matter within 45 days after the close of the comment period. Alternatively, the agency may decide that further fact gathering is appropriate. In this event, NHTSA will publicly announce an extension of the time for a supplemental decision. Such fact gathering may include one or more studies of automatic belt usage which would take one or more years to complete.

ADDRESSES: Comments should refer to the docket number and be submitted to the Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590. Docket hours are 8 a.m. to 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

Courtney M. Price, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration, Washington, D.C. 20590 (202-426-1810)

SUPPLEMENTARY INFORMATION:

On April 6, 1981, Secretary of Transportation Andrew L. Lewis issued a notice (incorporated herein by reference) proposing various alternatives for amending the provisions of Federal Motor Vehicle Safety Standard 208, *Occupant crash protection*, that would have required the front seating positions in all new cars to be equipped with automatic restraints (46 Fed. Reg. 21205). Two alternatives would have altered the schedule for implementing that requirement. The third alternative was the rescission of the requirement.

Based on the comments on the proposal and other available information, the NHTSA Administrator issued an order pursuant to section 103 of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1392, amending Standard 208 by rescinding the automatic restraint requirement. (46 Fed. Reg. 53419; October 29, 1981.)

On June 1, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the rescission of the automatic restraint requirement, holding it to be "arbitrary and capricious." *State Farm Mutual Automobile Insurance Co., et al.* v. *Department of Transportation, et al.*, (D.C. Cir. Nos. 81-2220, 2221). While the Court accepted NHTSA's determination that under the existing standard detachable automatic belts lacking ignition interlocks would be installed in almost all cars, and that, when detached, these belts would be functionally identical to a manual belt, the Court found that NHTSA lacked evidence on what the predicted usage of such detachable automatic belts would be under the existing standard. The Court also concluded that NHTSA did not adequately consider regulatory alternatives such as amending the standard to require that all automatic belts be nondetachable, or to limit means of compliance to air bags only. While the Court denied the requests of petitioners to reinstate the automatic restraint requirement's effective dates, and directed withholding of the

mandate effecting its decision until after disposition of any motion for rehearing, it contemplated that NHTSA would conduct further proceedings in order to further justify its rescission.

To address the questions raised by the Court, NHTSA requests comments from any interested party on predicted usage of automatic restraint systems in general, and in particular of detachable automatic belts lacking an ignition interlock. In addition, NHTSA seeks suggestions on how studies to obtain reliable and statistically significant empirical evidence on usage may be feasibly undertaken in a reasonable period of time and at a reasonable cost.

In its own efforts to respond to the Court's decision, NHTSA has identified criteria which studies should satisfy in order to be feasible and successful and then develop various possible study formats that would involve equipping a large number of private cars, or more limited numbers of corporate fleet cars or rental fleet cars, with different types of detachable and nondetachable two and three point belts. NHTSA's preliminary consideration of such study formats have indicated potential difficulties such as obtaining sufficient volumes of reliable and statistically significant data, the costs and allocation of such costs among interested parties, the length of time required to conduct a study or studies, the representativeness of the fleets' belt systems and users, and the elimination of the aspect of economic or voluntary selection bias. These criteria, study formats and potential difficulties are described in an Appendix to this notice. NHTSA seeks comments on these or other study formats, from any interested party, especially those parties who might participate in such studies, such as manufacturers, rental agencies and/or corporate fleets. The agency requests that special attention be given to all such comments to the above described problem areas of cost, time, representativeness, and elimination of bias.

NHTSA also seeks comments from all interested parties on the questions raised by the Court, including specifically regulatory alternatives such as amending the standard to require that all automatic belts be nondetachable or to limit means of compliance to air bags only. Additional suggestions as to other alternatives which interested parties might feel meet the concerns advanced by the Court will of course be considered as well.

The information obtained from commenters and that already in the voluminous record of proceedings on this issue will be used by the agency to determine the appropriate step to be taken regarding future action concerning the automatic restraint requirement. In addition to the regulatory alternatives mentioned by the Court or which may be raised by interested parties, the suspension of this aspect of the standard or a reinstatement of the agency's rescission remain among the possible actions which might be taken by the agency.

Finally, beginning on the date of the Order of rescission, NHTSA has requested all of the major domestic and foreign car manufacturers who have in the past had an air bag development program at any level or stage of progress to participate in efforts leading to the voluntary introduction of air cushion restraints as options in new car lines. NHTSA has discussed with the Department of Defense and the General Services Administration, which operate the government's largest vehicle fleets, the possibility of participation by such agencies in any such demonstration program. NHTSA will continue its current efforts to seek voluntary commitments by automobile manufacturers to offer automatic restraints as options in fixed numbers of new cars. The agency seeks comments on these efforts as well as any other suggestions to promote voluntary development of advanced occupant protection technology.

All comments should have in mind NHTSA's statutory obligation to issue motor vehicle safety standards that it

finds are "reasonble," "appropriate," and "practicable," and "meet the need for motor vehicle safety and [are] stated in objective terms." (15 U.S.C. § 1392(a) and (f).)

Interested persons are invited to submit comments on the notice. It it is requested but not required that 10 copies be submitted.

All comments must be limited not to exceed 15 pages in length. Necessary attachments may be appended to these submissions without regard to the 15-page limit. Commenters are specifically urged to address factual data and comments to the issues addressed by the Court. Incorporation by reference of earlier testimony or comments to the docket is specifically urged. These limitations and requests are intended to encourage commenters to detail their primary arguments in a concise fashion.

The agency is providing a 30-day comment period to facilitate the early consideration and resolution of the issues discussed in this notice.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. Any claim of confidentiality must be supported by a statement demonstrating that the information falls within 5 U.S.C. section 552(b)(4), and that disclosure of the information is likely to result in substantial competitive damage; specifying the period during which the information must be withheld to avoid that damage; and showing that earlier disclosure would result in the damage. In addition, the commenter or, in the case of a corporation, a responsible corporate official authorized to speak for the corporation must certify in writing that each item for which confidential treatment is requested

is in fact confidential within the meaning of section 552 (b) (4) and that a diligent search has been conducted by the commenter or its employees to assure that none of the specified items has previously been disclosed or otherwise become available to the public.

All comments received before the close of business on the comment closing date indicated above will be considered, and will be available for examination in the docket at the above address. To the extent possible, comments filed after the closing date will also be considered. However, the agency may proceed at any time after that date, and comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. The NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

LIST OF SUBJECTS IN 49 CFR 571:

Imports
Motor vehicle safety
Motor vehicles
National Highway Traffic Safety Administration
Rubber and rubber products
Tires

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 U.S.C. 1392, 1407))

Issued on

RAYMOND A. PECK, JR.
Administrator

APPENDIX

Staff Analysis of Possible Research Studies on Automatic Belt Usage

The agency has undertaken again to consider whether it is feasible to gather reliable and statistically significant data regarding the usage of detachable automatic belts lacking use-compelling devices.

Immediately following the issuance of the court's June 1, 1982 opinion and order, the Administrator directed the agency's technical, planning and legal staff to consider how the agency might attempt to gather empirical data which could form a valid basis for predicting changes in seat belt usage under the automatic restraint requirement. The staff was asked first to develop criteria which any research program should satisfy if it is to produce reliable data. The staff was asked then to devise different types of research programs in an effort to find one or more formats that might satisfy those criteria.

Agency staff developed tentative criteria which, if satisfied, could produce research results from which to predict the response of the general public on a nationwide basis to the equipping of new cars with automatic belts. These criteria reflect a variety of considerations, such as sensitivity of belt usage to car size, social and economic background of the motorists, and quality of the seat belt design.

General Criteria

First, the agency must be able to gather enough data regarding the reaction of motorists to these belts to provide statistically significant results. The staff believes that the goal of its research should be 95 percent confidence of accuracy within plus or minus 2 percentage points. Information on 1,875 people would be necessary to achieve that goal, with respect to each type of belt system involved. It should be noted that gathering sufficient data

to develop statistically significant results would not ensure that it would be possible to make valid inferences of behavior of the general population. It would be possible to draw valid conclusions about the belt usage rates of the general public only if the observed population is itself representative of the experience that the general public would have under the automatic restraint requirement.

Second, the research program should be a controlled experiment, comparing the use of one type of seat belt to that of other types under neutral, unbiased circumstances.

Third, the data should be gathered through direct observation instead of questionnaires or telephone inquiries. When subjects in indirect surveys are asked whether they have participated in behavior they perceive as socially desirable or responsible, respondents tend to overestimate participation. Agency experience confirms that this phenomenon occurs in belt usage surveys.

Fourth, it must be possible to secure cars equipped with subject belt systems (e.g., two-point and three-point automatic belts, both detachable and nondetachable), and arrange for them to be introduced into a target population.

Fifth, the users of the subject vehicles should be representative of the national population of motorists.

Sixth, the belts should be representative of the quality of the different belt designs that would be likely to be offered to the general public if the automatic restraint standard were implemented.

Seventh, these cars should be representative of the various size classes of cars available to the public.

Eighth, the users of these cars should have the same limited choice about using a car equipped with such a belt system as the general public would have under a mandatory requirement, i.e., no opportunity to reject all of the systems.

Ninth, the usage period should be long enough to enable them to react and behave naturally, and get over the novelty effect of the belt system. This would involve either extension of the study over a period of time sufficient for the user to cease to regard himself as a subject of a study, or the undertaking of the study without any awareness thereof by the subject population of users.

Other considerations include the time and cost necessary to complete the studies. Estimating duration of a study is an extremely uncertain exercise since it is not possible to determine the precise length of any of the study phases e.g., negotiation, letting of contracts, belt system design, belt system production, distribution of belt equipped cars, sale, rental or assignment of those cars, collection of data for the drivers of those cars, and analysis of the data.

The ultimate object of any study meeting these criteria is to generate data that would make it possible to predict the likely belt usage rates by the general public in cars produced under the automatic restraint requirement. The most direct way of generating these data is to observe randomly selected members of the general public. There is a major difficulty in proceeding in this fashion because the cars being studied would constitute an extremely small percentage of the total vehicle population. Increasing the target population of cars significantly to increase the rate of observation would be extremely expensive.

An alternative would be to study some surrogate population of cars whose use patterns are more regular and concentrated. This approach would increase the rate at which observers would spot the type of cars being studied. However, as discussed below, the faster rate of data accumulation is bought at the price of a variety of problems inherent in the use of surrogate populations.

Study Formats

With these criteria and the practical considerations of the rate of data accumulation in mind, three study formats suggest themselves.

The first would be a study of usage in cars sold to the general public. This study would involve large numbers of cars with various types and designs of automatic belts. The second would be a corporate fleet study. A limited number of cars equipped with automatic belts would be placed in a chosen corporate fleet and randomly assigned to users of fleet cars for relatively short periods of time. The third format would entail placing a limited number of cars equipped with automatic belts into a fleet with a less closed user population such as a rental car fleet, under stringent choice controls.

Private car study. The large number of cars involved in this study is intended to eliminate as much as possible the self-selection problem which taints the data relating to existing populations of automatic belt equipped cars. To further address that problem, there would not be any additional charge for automatic belt systems so that selection of cars with those systems would not be biased by the higher price that would otherwise have to be paid for them. By observing seat belt use in these cars by the general public for periods exceeding one year, several of the most serious biases of such studies might be effectively addressed. These include an observed belt usage decline as cars grow older and change owners.

The large number of cars required for such a study would be necessary to enable the agency to make the necessary amount of roadside observations. To avoid needing an even larger number of cars, the cars would be sold only in a limited geographic region. If it is possible to gain the cooperation of manufacturers and dealers to limit sales to a few cities, then only 160,000 cars would have to be equipped with the automatic belts and sold (40,000 cars for each of 4 types of automatic belts). If such cooperation could not be obtained, then a much larger number of cars would be necessary.

If it were possible to conduct this study on the limited scale suggested above, the study would require at least 18 months and possibly more than two years to complete.

This study format would be the most expensive of the studies considered by the agency, with cost estimated at $16 million.

Potential problems with this study format may include the following:

The difficulties of execution include obtaining cooperation and sales. Regardless of the scale of the study, there would be a question about the ability of the dealers to sell sufficient numbers of the cars. For example, although GM offered the continuous belts in 1980 Chevettes, only 13,000 out of several million of those cars were sold, with such belts, even though the first 8,000 were offered free, the balance were sold at a belt price below cost, and all were sold with a "secret" bonus to the salesman of $25.

Protracted negotiations for such cooperation could extend the above time estimates, which relate only to time projected by the agency for participating manufacturers to acquire, or, if necessary, design and produce the necessary belt systems and install them in sufficient numbers of new cars.

The cost of equipping necessary numbers of cars could be significant. Passing such costs through to purchasers could not only reduce acquisition, but would increase self-selection bias. Whether manufacturers, insurers or the agency would be able, alone or in concert, to underwrite the cost is uncertain.

Finally, even if sufficient numbers of equipped cars are sold to enable the agency to develop statistically significant results, the effect of self-selection could still be as strongly felt as it is among the existing population of automatic belt equipped Rabbits. To the degree sales fell below the desired levels, the self-selection problem would bias the results to an increasingly greater degree toward usage increase.

Corporate fleet study. Under this format, automatic belt equipped cars would be randomly assigned to succes-

sive different corporate employees. Use or nonuse of the belts would be observed or would be recorded by electronic devices in the cars. For this study, a relatively small number of cars, as few as 40 per seat belt type or a total of 160 cars, would be needed. This small number of cars is made possible by several factors. Since each car would pass through the possession of series of drivers, the seat belt usage choices of multiple drivers could be recorded for each car. Also, because the cars remain under the control of the fleet owner and must return periodically to a central location, observation would be much easier than under the private car study where the cars would be randomly scattered through the population. The need for cooperation of other parties may be limited to the need to find a willing corporate fleet owner. The direct economic cost of the belt systems for this study could be borne by the manufacturer, the fleet owner, the insurance carrier, the agency or some combination of those parties.

The corporate fleet study would be much less expensive and time-consuming than the private car study. The cost of the study would be from $300,000 to $400,000. It would take slightly less than a year to make the same number of observations that the private car study is intended to produce. However, if manufacturer designed and built belt systems are to be used, then additional cooperation and time would be needed. Also, it would require considerably longer than a year to complete if the desired number of cars and drivers are not available.

Potential problems with this study format may include the following:

Considerations of cost and time must be weighed together with factors potentially affecting the reliability of this study's results. First, the fleet owner may be one that promotes or in some way indicates a favorable attitude toward seat belt use by its employees. For example, it is likely that many fleet owners encourage belt use by employees using fleet cars while on corporate business.

Second, the employees of a single corporation may not be representative of the general public. This would be especially true with respect to those segments of the population most at risk, the youngest and oldest drivers, who are likely not to be represented at all. Third, there would be a risk that the existence of the study would become known to at least a portion of the closed population of employees eligible to drive cars in the corporate fleet. This knowledge could affect belt usage and thus taint the study results. Since belt usage is generally perceived as socially desirable, the bias would be toward higher usage figures. Fourth, the drivers would probably not treat the belts systems in these cars in the same fashion they would treat the belts in their own car. For example, an employee irritated by an automatic belt would be unlikely to damage the belt system in a company car, while a similarly irritated private car owner might cut the belt out of his or her car. Fifth, the relatively short period that each individual would be exposed to a given type of belt system would likely ensure that the novelty effect would not have any chance to wear off. The phenomenon of decline in belt usage as a function of time and familiarity would not have a chance to come into being and affect the belt usage observed in the study.

Rental car study. The object of this study would be to find a rental car population which experiences a relatively rapid turnover rate, such as the rental fleets at an airport. To avoid the difficulty that the agency's observers would encounter in making observations if a significant portion of the cars rented at the airport were returned to the rental company in other cities (intercity rentals), it would be necessary to select a fleet located in an area where such rentals are infrequent or to ensure that the specially equipped cars are limited to those persons not planning intercity travel.

This study would be similar to the corporate fleet study in several respects. Seat belt usage data could be gathered

by observation or electronic means. Data on belt usage by multiple motorists could be gathered for each car. The problem of self-selection would be significantly reduced if the cooperation of all rental companies regarding all car sizes could be obtained. Finally, the costs and number of cars also would be similar.

This study appears more attractive than the corporate fleet study in several respects. If the turnover rate is faster, the rental study would produce data on the number of drivers necessary to develop statistically significant results more quickly than would the corporate fleet study. However, rental frequency is difficult to predict. The rental study would also avoid the potential effects of the fleet owner's attitude toward belt usage and reduces the possibility that the existence of the study would become known to the users.

Potential problems with this study format may include the following:

The rental study would have many of the same difficulties that the corporate study would have in meeting the criteria, and in one instance those difficulties could be more severe. The drivers would not be representative of the general public. The typical renter of a car at an airport is likely to have a higher income than the average member of the driving public. The drivers would presumably not treat the belts in the same fashion that they would treat the belts in their own cars. The undesirable novelty effect could be accentuated by the very limited duration of most rentals. For the short duration of a rental, the drivers might well accept the inconvenience of a belt system that they would not accept in private vehicles.

The rental study may pose greater problems in gaining the cooperation of all necessary parties. The cooperation of all rental agencies at the site would be required, and the experimental belt systems would be required in all of their cars.

APPENDIX G

[46 Fed. Reg. 21205 (April 9, 1981)]

49 CFR Part 571

[Docket No. 74-14; Notice 22]

Federal Motor Vehicle Safety Standards;
Occupant Crash Protection

AGENCY: Department of Transportation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The purpose of this notice is to seek comment on a series of alternative amendments to the automatic restraint requirements of Safety Standard No. 208, *Occupant Crash Protection.* As amended by a final rule published in today's Federal Register, those requirements are currently scheduled to become effective for large cars and mid-size cars on September 1, 1982, and for small cars on September 1, 1983.

Under the first alternative being considered, the sequence of compliance would be changed so that small cars would be required to comply on September 1, 1982, mid-size cars on September 1, 1983, and large cars on September 1, 1984.

The second alternative would require all car sizes to begin compliance on March 1, 1983. In addition, the first and second alternatives would amend the automatic restraint requirements so that those restraints would not be required in the front center seating position.

The third alternative would rescind the automatic restraint requirements.

This action is being taken to ensure that Standard No. 208 reflects the changes in circumstances that have occurred since the automatic restraint requirements were issued in 1977, and to ensure that the standard meets the requirements of the National Traffic and Motor Vehicle

Safety Act of 1966 and Executive Order 12291, "Federal Regulation," (February 17, 1981).

DATE: Comments on this proposal must be received by: May 26, 1981.

ADDRESS: Comments should refer to the docket number and to the number of this notice and be submitted to: Docket Section, Room 5109, Nassif Building, 400 Seventh Street S.W., Washington, D.C. 20590. (Docket hours are 8:00 a.m. to 4:00 p.m.).

FOR FURTHER INFORMATION CONTACT: Mr. Michael Finkelstein, Office of Rulemaking, National Highway Traffic Safety Administration, Washington, D.C. 20590 (202-426-1810).

SUPPLEMENTARY INFORMATION: On February 12, 1981, the Department of Transportation published a proposal for a one year delay in the application of the automatic restraint requirements of Safety Standard No. 208 to large cars (46 FR 12033). That action was proposed in light of circumstances which made it necessary and appropriate to extend the effective date, and to provide an opportunity to review the requirements and determine the need for further revisions in the standard. In today's issue of Federal Register, the Department has published a final rule adopting the one year delay.

The purpose of this notice is to gather public comment to aid the review process. The notice proposes a wide range of possible changes to the automatic restraint requirements in order to encourage broad and creative public participation. The Department desires to ensure that it is taking the most effective and reasonable approach to addressing the serious safety problem posed by the low rate of safety belt use in all cars and by the steadily decreasing average size of new cars sold in this country. As discussed below, the Department is also undertaking an

intensive campaign to inform and encourage the public on the need for increased manual belt usage.

Background

The automatic restraint requirements of Standard No. 208 were adopted by the Department in 1977 (42 FR 34289; July 5, 1977). That decision was based on a variety of factors. The Department was confronted with a substantial safety problem. Approximately 25,000 occupants in the front seats of passenger cars were being killed annually in crashes. Although the cars were equipped with manual safety belts under Safety Standard No. 208, relatively few people were being protected since most people did not use manual belts. Studies showed that usage was about 20 percent for all types of belt systems.

The Department anticipated that this safety problem would progressively worsen as people began to switch to smaller, more fuel efficient cars. Generally, the chance of death or serious injury in a crash increases as car size decreases.

The Department concluded that there was no available way of increasing manual belt use. Although mandatory belt use laws had been used in combination in other countries to achieve dramatic increases in the rate of belt use, similar opportunities do not exist in this country. Based on Congressional action indicating disfavor with these laws and lack of State interest, enactment of mandatory use laws was not deemed to be a viable alternative.

To provide a solution to the problems of a high death and injury toll and of a low manual belt use rate, the Department turned to requiring the use of automatic restraints. Then, as now, the two systems that qualified as automatic restraints were air cushion restraints (air bags) and automatic seat belts (belts that automatically move into place when an occupant enters a vehicle and closes the door). Automatic restraints were found to be superior to manual belts because they were as effective as

manual belts in preventing death and injury and would provide protection in a much higher percentage of crashes. (Persons wishing to learn additional details about that and earlier rulemaking relating to automatic restraints are urged to consult dockets 69-7, 73-8 and 74-14 and the rulemaking notices associated with those dockets.)

The Department anticipated substantial safety benefits from the automatic restraint requirements. According to NHTSA's analysis, 9,000 fatalities and 65,000 serious injuries would be prevented annually once all cars on the road had automated restraints, i.e., ten years after initial implementation.

As the Department indicated in its February 12, 1981 proposal, the 1977 decision was based on a variety of key assumptions which, in the light of subsequent events, are no longer valid. The Department assumed that consumers would freely be able to choose between air bags and automatic belts, with 60 percent of cars having the former and 40 percent having the latter. The air bag percentage was based on the expectation that all large cars and intermediates, and half of the compacts would be equipped with those systems. The Department believed also that some of the even smaller cars would be equipped with air bags.

These factors, together with the greater design problems and absence of experience in installing air bags in smaller cars, led the Department to phase-in the automatic requirements beginning with large cars. Current manufacturer plans contemplate almost no installation of air bags, only about 1 percent of the total fleet of new cars. As a result, the phasing-in of the requirements with large cars first and small cars last requires reexamination.

The phase-in sequence is further called into question by the accelerated switch from large cars to less safe,

smaller ones. The Department recognized that a switch would occur as a result of 1973-74 oil shock and the impending implementation of fuel economy standards. It did not, however, anticipate that the switch would occur as rapidly as it has, due in large measure to the subsequent oil cut-off of 1979. In 1977, NHTSA estimated that size mix in the early 1980's would be 24 percent small cars, 53 percent mid-size cars, and 23 percent large cars. Now the expectation is that new car fleet will consist of 1 percent large cars, 58 percent mid-size cars and 41 percent small cars. When the numbers of large and small cars in the early-mid 1980's were expected to be approximately the same, the sequence of implementation had no significance in terms of the cars equipped with automatic restraints. Given the currently expected fleet mix of large and small cars, the sequence has substantial significance, especially since smaller cars are less safe.

In 1977, NHTSA believed that automatic belts would cost only 34 dollars more than manual belts and that air bags would cost approximately 154 dollars more than manual belts. Today, NHTSA's comparable figures are 105 dollars for the incremental cost of automatic belts, and at least 400 dollars for air bags at high production volumes and as much as 1,100 dollars at low volumes.

The Department has now undertaken to review the automatic restraint requirements and their implementation schedule in view of changed circumstances which undermine the reasonableness of the existing implementation schedule, the substantial impact of automatic restraints on manufacturer and consumer costs and the accentuation of those manufacturer impacts by the economic difficulties of the automobile industry.

In the analysis which preceded the February 12 proposal, the Department determined that a number of additional factors are relevant. Among these factors is the unnecessary character of the costs which would be incurred by application of automatic restraint requirements

to large cars scheduled to be phased-out in the near future. These costs would arise largely from the loss of sales due to increased costs, and to the loss of the middle front seating position in large cars.

Another factor is the possibility that initial public acceptance of automatic restraints might have been adversely affected by the decision of large car manufacturers not to make air bags available in model year 1982. Still another factor was the effect of current automatic belt designs on public acceptance and usage.

Based on all of these factors, the Department decided to adopt the one year delay for installing those restraints in large cars.

In conjunction with this decision, the Department is preparing to undertake an intensive public education campaign to induce the public to use their safety belts. This campaign would affect not only the 1982 model year cars which now will be equipped almost exclusively with manual belts but also all other belt-equipped vehicles on the road today. The number of seat belt-equipped vehicles is over 150 million. Accordingly, it is expected that a properly conceived and sustained program, aided by manufacturers and other levels of government, would make an important contribution of vehicle safety.

The same factors underlying the one year delay also lead the Department to issue this notice and propose three principal alternatives.

Principal Proposals

1. *Reversal of phase-in sequence.* Under this proposal, the automatic restraint requirements would become effective for small cars (wheelbase of 100 inches or less) on September 1, 1982, for mid-size cars (wheelbase greater than 100 inches and less than 114 inches) on September 1, 1983, and for large cars (wheelbase of 114 inches or greater) on September 1, 1984. This proposal would have

the advantage of ensuring that automatic restraints are first placed in the car size class which presents the greatest safety risk.

If adopted as proposed, it could produce greater net benefits than implementation of the automatic restraint requirements in accordance with the original phase-in schedule established in 1977. This gain would result from the greater safety risk posed by small cars than by large cars and the increasingly greater number of small cars over large ones.

The Department notes also that requiring small cars instead of large cars to comply first would require a much larger proportion of manufacturers to begin compliance simultaneously than under the original schedule. Thus, the new schedule would be more equitable and reasonable. Still another advantage of this proposal is that it would avoid, to a large extent, the necessity and extra cost of redesigning and equipping large cars with automatic restraints for the few years that these cars will continue to be produced. In view of the substantial experience of several manufacturers with designing and producing small cars with automatic belts, it is believed that there is sufficient leadtime to implement this proposal.

2. *Simultaneous compliance.* Under this proposal, all size classes would be required to begin compliance at the same time, i.e., March 1, 1983. This proposal allows compliance to begin a half year later than under the first proposal, to offset switching from a phase-in compliance schedule to a simultaneous one. Like the first proposal, this proposal could yield benefits greater than the original phase-in schedule by accelerating the date on which all cars must be equipped with automatic restraints. This proposal could be construed as even more equitable than the first in that all manufacturers would have to bring all of their cars into compliance at the same time.

3. *Rescission.* The third principal proposal is to rescind the automatic restraint requirements. The principal considerations underlying this proposal are the unlikelihood of public acceptability of automatic restraints in the absence of any significant degree of choice between automatic belts and air bags, the public acceptability of the specific automatic belt designs currently planned by the automobile manufacturers, uncertainties about the general public's rate of future usage of both automatic and manual belt systems, and the substantial cost of air bags even if produced in large volumes.

Additional Proposals

In conjunction with the first and second principal proposals, the Department is also proposing to except the front center seating position of cars from automatic restraint requirements. With that exception, manufacturers could equip that seating position with either a manual belt or with an automatic restraint. This exception is intended to solve a dilemma presented manufacturers in bringing six seat passenger cars into compliance with the current automatic restraint requirements. Since the only known type of automatic restraint for the center seating position is the air bag, manufacturers are faced with a choice of either equipping all three front seating positions with the relatively expensive air bag, or removing the center position and equipping the remaining two with automatic belts.

The latter choice permits use of the less expensive type of automatic restraint, but has the offsetting disadvantage of reducing the utility of the car. The advantage of such an exception is that it would enable manufacturers to retain the center position and equip the two outer front positions with automatic belts. If the automatic belts were the detachable type, they would permit ready access to the center position. The Department recognizes that usage rate of detachable automatic belts may be less than that for nondetachable types.

The Department also seeks comment on the desirability of and authority for adopting a suggestion made by Volvo in commenting on the February 12 proposal. Out of concern about the perceived marketing need for flexibility in the beginning of new model years and about the relative inflexibility of the normal agency practice of treating September 1 as the beginning of the model year, Volvo suggested that effective dates be specified as "September 1 or the date of production start of the new model year if this date falls between September 1 and December 31."

Impacts of Proposals

The Department has considered the impacts of these proposals and determined that each of the three principal proposals in the notice is a major rulemaking within the meaning of E.O. 12291. A preliminary regulatory impact analysis is being placed in the docket simultaneously with the publication of this notice. A copy of the analysis may be obtained by contacting the docket at the address given at the beginning of this notice.

As noted above, it is expected that both the reversal proposal and the simultaneous compliance proposal could produce benefits equal or greater than the benefits of the revised schedule. This would result primarily from the earlier compliance by small cars which pose greater safety risks than large or mid-size cars. Rescission of the automatic restraint requirements could, after ten years, cause a loss of 750-7,500 lives annually based on the benefits to be expected from all cars on the road having been equipped with automatic restraints by that time.

The precise safety impacts of these and the other proposals depend largely on the usage rate of automatic belts and the effectiveness of the planned public information campaign. As set forth in more detail in the regulatory impact analysis accompanying the Final Rule published elsewhere in the issue of the Federal Register, NHTSA

now anticipates a usage rate in the range of 15-60 percent. The rate will ultimately depend on how the public reacts to the automatic belt designs, especially the detachable ones which now appear likely to become the predominant type.

The cost effects of the reversal and simultaneuos compliance proposals would be mixed. For example, the reversal proposal would cause the manufacturing and consumer costs of model year 1983 small cars to increase and of model year 1983 mid-size and large cars to decrease. Some slight loss of sales or deferral of purchases of model year 1983 small cars and model year 1984 mid-size cars could occur, although such effects should be minimized by the market forces pushing consumers toward smaller, more fuel efficient cars.

The cost impacts of the simultaneous compliance proposal would depend on how near the manufacturers come to beginning compliance on March 1, 1983. If they began precisely on that date, then the manufacturer and consumer costs would decrease for the mid-size and large cars produced during the first half of model year 1983 and would increase for the small cars produced during the latter half of that model year. The effect on individual company sales should be minimized by this proposal, since competitive effects among manufacturers and different car size classes would be eliminated.

The rescission proposal would produce substantial savings in manufacturer capital investments and variable costs and in consumer costs. The savings in capital investments alone would be at least several hundred million dollars. The annual savings in manufacturing and consumer costs would be much greater, based on the costs that would otherwise be incurred in installing automatic restraints in all new cars.

The effects of this notice on small entities have been considered under the Regulatory Flexibility Act. Inter-

ested persons should consult both the preliminary regulatory impact analysis prepared for this notice and also the final regulatory impact analysis for the one year delay notice published today.

Although almost none of the direct or indirect suppliers of air bags and automatic belts are considered to be "small businesses," the Department did examine the impact on those suppliers. It is believed that the impact of the reversal and simultaneous compliance proposals should be minimal, because those proposals accelerate the compliance of some cars while delaying the compliance of others and since, in the case of automatic belt manufacturers, these businesses produce both automatic and manual belts.

Rescission of the automatic restraint requirements would adversely affect both automatic belt manufacturers and air bag manufacturers. To the extent that the profit to these manufacturers from automatic belt sales exceeds that from manual belt sales, the revenue of these manufacturers will decrease. Given the decision of the car manufacturers to use automatic belts almost exclusively in complying with the automatic restraint requirements, the impact of a rescission on air bag manufacturers may actually be quite limited. Nevertheless, the Department notes that air bag suppliers responding to its February 12 proposal stated that any further delay or uncertainty regarding the automatic restraint effective dates would adversely affect their prospect.

The only proposal that would more than minimally affect small governments and other small fleet purchasers would appear to be rescission. Its adoption would give them a cost savings similar to the one created for purchasers of large 1982 model year cars by the one year delay.

In accordance with the National Environmental Policy Act of 1969, the Department has considered the environ-

mental impacts of the proposals in this notice. A Draft Environmental Impact Statement will be placed in the docket for this rulemaking. Interested persons are also urged to consult the Final Environmental Impact Statement for the 1977 rule establishing the automatic restraint requirements.

Interested persons are invited to submit comments on the proposal. It is requested but not required that 10 copies be submitted.

All comments must be limited not to exceed 15 pages in length. Necessary attachments may be appended to these submissions without regard to the 15 page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. Any claim of confidentiality must be supported by a statement demonstrating that the information falls within 5 U.S.C. section 552(b)(4), and that disclosure of the information is likely to result in substantial competitive damage; specifying the period during which the information must be withheld to avoid that damage; and showing that earlier disclosure would result in that damage. In addition, the commenter or, in the case of a corporation, a responsible corporate official authorized to speak for the corporation must certify in writing that each item for which confidential treatment is requested is in fact confidential within the meaning of section 552 (b)(4) and that a diligent search has been conducted by the commenter or its employees to assure that none of the specified items has previously been disclosed or otherwise become available to the public.

All comments received before the close of business on the comment closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. However, the rulemaking action may proceed at any time after that date, and comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 U.S.C. 1392, 1407))

Issued on April 6, 1981.

Andrew L. Lewis, Jr.,

Secretary of Transportation.

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN AND LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, AS SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, AND RAYMOND A. PECK, JR., AS ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AUTOMOBILE IMPORTERS OF AMERICA, INC., MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL., CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Intervenors

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL, AND EUGENE J. MEYUNG,
Petitioners

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent

AUTOMOBILE IMPORTERS OF AMERICA, INC.,
CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL.,
SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK,
Intervenors

Petitions for Review of an Order of the
National Highway Traffic Safety Administration

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

JUDGMENT

These causes came on to be heard on petitions for review of an order of the National Highway Traffic Safety Administration and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the National Highway Traffic Safety Administration under review herein is vacated, and the cases are remanded to the National Highway Traffic Safety Administration for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 1, 1982

Opinion for the Court filed by Circuit Judge Mikva.
Concurring opinion filed by Circuit Judge Edwards.

APPENDIX I

STATUTORY PROVISIONS INVOLVED

The pertinent section of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), provides as follows:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The pertinent sections of the National Traffic and Motor Vehicle Safety Act of 1966, title I, as amended, 15 U.S.C. §§ 1381, 1391, 1392, 1394, and 1410b (1976 & Supp. IV 1980), provide as follows:

§ 1381. Congressional declaration of purpose

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

§ 1391. Definitions

As used in this subchapter—

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

• • • •

(10) "Secretary" means the Secretary of Transportation.

* * * *

§ 1392. Motor vehicle safety standards

(a) Establishment

The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

(b) Applicability of administrative procedure provisions

Subchapter II of chapter 5, and chapter 7, of title 5 shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.

(c) Effective date of orders

Each order establishing a Federal motor vehicle safety standard shall specify the date such standard is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date such order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

* * * *

(e) Amendment and revocation of standards

The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds,

for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(f) Factors to be considered in prescribing standards

In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * * *

§ 1394. Judicial review of orders establishing standards; additional evidence before Secretary; certified copy of transcript

(a) (1) In a case of actual controversy as to the validity of any order under section 1392 of this title, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such

order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the order in accordance with chapter 7 of title 5 and to grant appropriate relief as provided in such section.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(5) Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary o[r] any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(b) A certified copy of the transcript of the record and proceedings under this section shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, exclusion of imports, or other proceeding arising under or in respect of this subchapter, irrespective of whether proceedings with respect to the order have previously been initiated or become final under subsection (a) of this section.

§ 1410b. Occupant restraint systems

(a) Amendment of Federal motor vehicle safety standard numbered 208; effective date

Not later than 60 days after October 27, 1974, the Secretary shall amend the Federal motor vehicle safety standard numbered 208 (49 CFR 571.208), so as to bring such standard into conformity with the requirements of paragraphs (1), (2), and (3) of subsection (b) of this section. Such amendment shall take effect not later than 120 days after October 27, 1974.

(b) Federal motor vehicle safety standard requirements

After the effective date of the amendment prescribed under subsection (a) of this section:

(1) No Federal motor vehicle safety standard may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of,

any continuous buzzer designed to indicate that safety belts are not in use, or any safety belt interlock system.

(2) Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of

an occupant restraint system other than a belt system.

(3)(A) Paragraph (2) shall not apply to a Federal motor vehicle safety standard which provides that a manufacturer is permitted to comply with such standard by equipping motor vehicles manufactured by him with either—

(i) a belt system, or

(ii) any other occupant restraint system specified in such standard.

(B) Paragraph (2) shall not apply to any Federal motor vehicle safety standard which the Secretary elects to promulgate in accordance with the procedure specified in subsection (c) of this section, unless it is disapproved by both Houses of Congress by concurrent resolution in accordance with subsection (d) of this section.

(C) Paragraph (2) shall not apply to a Federal motor vehicle safety standard if at the time of promulgation of such standard (i) the 60-day period determined under subsection (d) of this section has expired with respect to any previously promulgated standard which the Secretary has elected to promulgate in accordance with

subsection (c) of this section, and (ii) both Houses of Congress have not by concurrent resolution within such period disapproved such previously promulgated standard.

(c) Federal motor vehicle safety standard promulgation procedure; rule making requirement; data, views or arguments; presentation opportunity; transcript; notification of Congressional Committees; data, views, or arguments of Members of Congress; transmittal of standard to Congress and Congressional Committees

The procedure referred to in subsection (b)(3)(B) and (C) of this section in accordance with which the Secretary may elect to promulgate a standard is as follows:

(1) The standard shall be promulgated in accordance with section 1392 of this title, subject to the other provisions of this subsection.

(2) Section 553 of title 5 shall apply to such standard; except that the Secretary shall afford interested persons an opportunity for oral as well as written presentation of data, views, or arguments. A transcript shall be kept of any oral presentation.

(3) The chairman and ranking minority members of the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee shall be notified in writing of any proposed standard to which this section applies. Any Member of Congress may make an oral presentation of data, views, or arguments under paragraph (2).

(4) Any standard promulgated pursuant to this subsection shall be transmitted to both Houses of Congress, on the same day and to each House while it is in session. In addition, such

standard shall be transmitted to the chairmen and ranking minority members of the committees referred to in paragraph (3).

(d) Concurrent resolution of disapproval during prescribed period; Federal motor vehicle safety standard effective upon expiration of such period

(1) A standard which the Secretary has elected to promulgate in accordance with subsection (c) of this section shall not be effective if, during the first period of 60 calendar days of continuous session of Congress after the date of transmittal to Congress, both Houses of Congress pass a concurrent resolution the matter after the resolving clause of which reads as follows: "The Congress disapproves the Federal motor vehicle safety standard transmitted to Congress on ———, 19—."; (the blank space being filled with date of transmittal of the standard to Congress). If both Houses do not pass such a resolution during such period, such standard shall not be effective until the expiration of such period (unless the standard specifies a later date).

(2) For purposes of this section—

(A) continuity of session of Congress is broken only by an adjournment sine die; and

(B) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(e) Judicial review of Federal motor vehicle safety standard

This section shall not impair any right which any person may have to obtain judicial review of a Federal motor vehicle safety standard.

(f) Definitions

For purposes of this section:

(1) The term "safety belt interlock" means any system designed to prevent starting or operation of a motor vehicle if one or more occupants of such vehicle are not using safety belts.

(2) The term "belt system" means an occupant restraint system consisting of integrated lap and shoulder belts for front outboard occupants and lap belts for other occupants. With respect to (A) motor vehicles other than passenger vehicles, (B) convertibles, and (C) open-body type vehicles, such term also includes an occupant restraint system consisting of lap belts or lap belts combined with detachable shoulder belts.

(3) The term "occupant restraint system" means a system the principal purpose of which is to assure that occupants of a motor vehicle remain in their seats in the event of a collision or rollover. Such term does not include a warning device designed to indicate that seat belts are not in use.

(4) The term "continuous buzzer" means a buzzer other than a buzzer which operates only during the 8 second period after the ignition is turned to the "start" or "on" position.

APPENDIX J

LISTING OF PETITIONERS AND THEIR PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Petitioners are the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., and Automobile Importers of America, Inc. ("AIA").

MVMA is an incorporated not-for-profit trade association. Its members are:

American Motors Corporation
Checker Motors Corporation
Chrysler Corporation
Ford Motor Company
Freightliner Corporation
General Motors Corporation
International Harvester Company
Mack Trucks, Inc.
Man Truck and Bus Corporation
PACCAR Inc.
Volkswagen of America, Inc.
Volvo North America Corporation

The publicly-identified * parent companies, subsidiaries (other than wholly-owned) and affiliates of each member of MVMA that is a petitioner in this case are listed below under the name of the related petitioner:

American Motors Corporation

Regis Nationale Des Usines Renault

Checker Motors Corporation

Calumet Ins. Co.

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* Standard & Poor's Corporation Records (1982) and Moody's Industrial Manual (1982).

Chrysler Corporation

Chrysler De Mexico S.A.
Aire y Temperatura S.A.
Chrysler Financial Corp. (Mich.)
Chrysler Canada Ltd. (Canada)
Perth Metal Industries, Ltd. (Canada)
Chrysler Credit Corp. (Del.)
Chrysler Leasing Corp. (Del.)
Chrysler Credit SBL Corp. (Mich.)
Chrysler Insur. Co. (Mich.)
Chrysler Life Insur. Co. (Mich.)
Redisco Canada Ltd. (Canada)
Chrysler Credit Venezuela S.A. (Del.)
Chrysler Credit Canada Ltd. (Canada)
Beaugency Limitee (Quebec)
Chrysler Finance Limited (Ontario)
Chrysler Life Insurance Co. of Canada (Canada)
Chrysler Commercial S.A. De C.V. (Mexico)
Chrysler Financial Overseas Capital N.V.
(Netherlands Antilles)
Chrysler Leasing, Ltd. (Canada)
Mitsubishi Motors Corp.
PSA Peugeot — Citroen

Ford Motor Company

Ford Motor Land Development Corp.
Ford Leasing Development Co.
Transcon Insurance Ltd.
Detroit Downtown Development Corp.
Ford Motor Co. of Canada, Ltd. (Canada)
Ford Motor Co. of Australia, Ltd. (Australia)
Ford Motor Co. of South Africa (Pty.) Ltd. (S.A.)
Ford Motor Co. (Belgium) N.W. Belgium
Ford-Werke AG (Germany)
Ford Nederland N.V. (Netherlands)
Ford Brasil S.A. (Brazil)
Ford Motor Co. A/S (Denmark)
Toyo Kogyo Co., Ltd.
Ford Motor Credit Co.

General Motors Corporation

General Motors Acceptance Corp. (N.Y.)
GMAC, Australia (Del.)
GMAC of Canada, Ltd. (Canada)
GMAC, South America (Del.)
GMAC, Suisse S.A. (Switzerland)
GMAC, Continental (Del.)
GMAC, International (Del.)
GMAC, Italia S.p.A. (Italy)
GMAC De Mexico, S.A. (Mexico)
GMAC (N.Z.) Ltd. (New Zealand)
GMAC South Africa (Proprietary) Ltd. (South Africa)
GMAC Nederland, N.V. (Netherlands)
GMAC (U.K.) Ltd. (England)
GMAC, Colombia S.A. (Del.)
GMAC Overseas Finance Corp. N.V. (Netherlands Antilles)
GMAC Commercial Automotriz Chile S.A. (Chile)
GMAC Automotriz Limitada (Chile)
GMAC Commercial Corp. (Del.)
GMAC Leasing Corp. (Del.)
Opel Kredit Bank GmbH (Germany)
Motors Insurance Corp. (N.Y.)
CIM Insurance Corp. (N.Y.)
MIC General Insurance Corp. (Ind.)
MIC Life Insurance Corp. (Del.)
MIC Property and Casualty Insurance Corp. (Mich.)
MIC Services Corp. (Del.)
Cadmic Agency Corp. (Del.)
Trinity General Agency, Inc. (Tex.)

Fabrica Colombiana De Automotores S.A. (Columbia)
General Motors Pilipinas, Inc. (Philippines)

Volkswagen of America, Inc.

Volkswagenwerk AG
- Deutsche Automobil g.m.b.H.
- AUDI NSU AUTO UNION AG
- TAS Tvornica Automobila Sarajevo
- WESER-EMS Vertriebs G.m.b.H.
- Forjaria Sao Bernardo S.A.
- Companhia Vale Do Rio Cristalino S.A.
- interRent Trucks S.A.
- TRIUMPH-ADLER AG
- Adlerwerke vorm. Heinrich Kleyer AG
- Volkswagen Do Brazil, S.A.
- Volkswagon Argentina

AIA is a not-for-profit trade association incorporated in the District of Columbia. It has no parents, subsidiaries or affiliates. Its members are:

- Alfa Romeo, Inc.
- American Honda Motor Company, Inc.
- BMW of North America, Inc.
- De Lorean Motor Company
- Fiat Motors of North America, Inc.
- Isuzu Motors Limited
- Jaguar Rover Triumph, Inc.
- Lotus Cars Limited
- Mazda Motors of America, Inc.
- Mitsubishi Motors Corporation
- Nissan Motor Corporation in U.S.A.
- Peugeot Motors of America, Inc.
- Rolls-Royce Motors, Inc.
- Saab-Scania of America, Inc.
- Subaru of America, Inc.
- Toyota Motor Sales, U.S.A., Inc.
- Volvo North America Corporation

The AIA subscribing members whose interests are represented here are:

Hyundai Motor Co., Ltd.
Renault USA, Inc.
Satra Corporation
U.S. Suzuki Motor Corporation
Yamaha Motor Corporation, U.S.A.

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

[Counsel Listed on Inside Cover]

December 23, 1982

PETITIONS FOR CERTIORARI
FILED AUGUST 30, 1982 AND SEPTEMBER 8, 1982
CERTIORARI GRANTED NOVEMBER 8, 1982

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK*
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
TERRENCE J. LEAHY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Of Counsel:

WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

JAMES F. FITZPATRICK*
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724

Of Counsel:

DONALD P. MCHUGH
Vice President and General Counsel
State Farm Mutual Automobile Insurance Co.

Counsel for Respondents State Farm Mutual Automobile Insurance Company, et al.

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
RICHARD M. HALL
ZUCKERT, SCOUTT, RASENBERGER & DELANEY
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Of Counsel:

LOWELL R. BECK, President and
PAUL C. BLUME, Vice President & General Counsel
National Association of Independent Insurers

DONALD L. SCHAFFER, Senior Vice President, Secretary & General Counsel
Allstate Insurance Companies

Counsel for Respondents National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyers

N. RICHARD SKIPPER, JR.,
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

MILTON D. ANDREWS
DONALD M. SCHWENTKER
LANCE E. TUNICK
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007

Counsel for Petitioner Automobile Importers of America, Inc.

RONALD A. ZUMBRUN
PACIFIC LEGAL FOUNDATION
455 Capitol Mall, Suite 600
Sacramento, California 95814
(916) 444-0154
RAYMOND M. MOMBOISSE
SAM KAZMAN*
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
(202) 466-2686

Counsel for Petitioners Consumer Alert and Pacific Legal Foundation

ROBERT ABRAMS*
Attorney General
of the State of New York
Two World Trade Center
New York, New York 10047
(212) 488-2464

Of Counsel:

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions
ROBERT S. HAMMER
Assistant Attorney General

Counsel for Respondent Superintendent of Insurance of the State of New York

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT E. KOPP
MICHAEL F. HERTZ
C. FREDERICK GEILFUSS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Petitioners United States Department of Transportation, et al.

**Counsel of Record*

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Order of the United States Court of Appeals for the District of Columbia Circuit denying intervenor's motion for a stay of enforcement and dismissing intervenor's motion for expeditious consideration as moot, filed December 8, 1982	18

The parties respectfully call the Court's attention to the fact that they have lodged with the Clerk 15 copies of the Joint Appendix which was submitted to the court below as part of the record. Citations to that Appendix in the briefs will be preceded by the letter "R."

NOTICE

The following materials have been omitted in printing this Joint Appendix because they appear on the following pages of the Appendices to Petition for Writ of Certiorari in No. 82-354:

	Page
Notice of Proposed Rulemaking by National Highway Traffic Safety Administration (April 6, 1981)	147a
Final Rule of National Highway Traffic Safety Administration (October 23, 1981)	88a
Order of the Court of Appeals, denying motions for stay and ordering expedited briefing schedule (December 7, 1981)	86a
Opinion and Order of the Court of Appeals (June 1, 1982)	1a
Judgment of the Court of Appeals (June 1, 1982)	160a
Notice of Filing of National Highway Traffic Safety Administration, providing notice that NHTSA intends to publish the attached notice of proposed supplemental rulemaking in the Federal Register (July 1, 1982)	130a
Order and Memorandum of the Court of Appeals, denying motions for extension of time in which to file petitions for rehearing and/or rehearing en banc (August 4, 1982)	83a
Order and Memorandum of the Court of Appeals, staying effective dates of Federal Motor Vehicle Safety Standard 208 (August 14, 1982)	79a

[EXCERPTED DOCKET ENTRIES]

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No.] 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as Secretary, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK., JR., as ADMINISTRATOR,
Respondents.

SUPERINTENDENT OF INSURANCE OF STATE OF N.Y., AUTOMOBILE IMPORTERS OF AMERICA, INC., MOTOR VEHICLE MANUFACTURERS ASSOC., *et al.*, CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Intervenors.

Date	FILINGS—PROCEEDINGS
11-23-81	Petitioners' petition for review of an order of the NHTSA
11-25-81	Petitioners' emergency motion for stay pending judicial review
11-25-81	Petitioners' motion for expedited hearing and shortened schedule for briefing and filing of record
12-01-81	Petitioners' motion to consolidate petitions for review Nos. 81-2220 & 81-2221 for purposes of hearing and decision

Date	FILINGS—PROCEEDINGS
12-03-81	Clerk's order consolidating Nos. 81-2220 & 81-2221 on the merits and the time for filing a response to motion for stay is extended to 12/3/81
12-07-81	Per Curiam order denying motions for stay. Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (DC Cir. 1958) and briefing and hearing of these cases on the merits shall be expedited and these cases shall be scheduled for argument on the Feb-March calendar, Feb. 11 - March 3, 1982. * * * The parties are instructed to address in their briefs the amount of time that will be required by the agency and by the affected automobile manufacturers to take appropriate action in the event that this Court invalidates in whole or in part the agency's rescission order of October 29, 1981; Wald (who did not participate), Mikva and Edwards, CJs
12-07-81	Certified List of the Administrative Record (consists of three large black binders)
12-29-81	Petitioners' principal brief
01-05-82	Intervenor's (Albert B. Lewis, Sup. Insurance of State of NY) brief
01-25-82	Respondents' brief
02-01-82	Intervenors' (Motor Vehicle Manufacturers Assoc., et al.) brief
02-01-82	Intervenors' (Consumer Alert and Pacific Legal Foundation) brief
02-08-82	Petitioners' reply brief
02-09-82	Petitioners' reply brief
03-01-82	Argued before SCJ Bazelon; Mikva and Edwards*, CJ's

Date	FILINGS—PROCEEDINGS
06-01-82	Opinion for the Court filed by Circuit Judge Mikva
06-01-82	Opinion concurring in part filed by Circuit Judge Edwards
06-01-82	Judgment that the orders of the National Highway Traffic Safety Admin. are vacated and the cases are remanded to the NHTSA for further proceedings, in accordance with the opinion of this Court filed herein this date
06-01-82	Per Curiam order by the Court, sua sponte, that the schedule for resolving questions which the Court's opinion filed herein this date directs respondent Administration to file (see page 76 of slip opinion), shall be filed and served upon counsel of record on or before July 1, 1982; It is Further ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing; see Local Rule 14, as amended on November 30, 1981
07-01-82	Respondents' notice of filing that NHTSA intends to publish the attached notice of proposed supplemental rulemaking in the Federal Register
07-12-82	Respondents' motion to extend time to file rehearing and/or suggestion of rehearing en banc
08-04-82	Per Curiam order that the motions for extension of time in which to file petitions for rehearing and/or rehearing en banc are denied; and that the period for filing timely petitions for rehearing and/or rehearing en banc having expired, the mandate in the

Date	FILINGS—PROCEEDINGS
	above captioned case be issued accordingly; SCJ Bazelon, Mikva and Edwards, CJs (see attached memorandum)
08-04-82	Per Curiam order, sua sponte, that the compliance dates of Federal Motor Vehicle Safety Standard 208, the passive restraint standard, are stayed until 09/01/83 (Model Year 1984); and sua sponte, that respondent DOT has until 10/01/82, to advise the Court whether such a compliance date is achievable, or whether a longer period is required, setting forth adequate reasons therefor; SCJ Bazelon, Mikva and Edwards, CJs (see attached memorandum)
08-4-82	Certified copy of judgment and opinion issued to NHTSA.
08-30-82	Copy of letter from Clerk, Supreme Court dated 08-25-82 extending time for filing petition for writ of certiorari to 09-08-82 in SC No. A-180
09-01-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on August 30, 1982 in SC. No. 82-354 (Motor Vehicle Manufacturing Assoc.)
09-01-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on August 30, 1982 in SC No. 355 (Consumer Alert, et al.)
09-16-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on 09-08-82 in SC No. 82-398 (US Dept. of Transportation, et al.)
10-04-82	Respondents' memorandum in response to the court 08-04-82 order

Date	FILINGS—PROCEEDINGS
10-04-82	Petitioners' (State Farm Mutual Automobile Insurance Co., et al.) motion for leave to respond to NHTSA's comments on the September, 1983 compliance date
10-12-82	Petitioners' (National Association of Independent Insurers, et al.) motion for leave to file comments on second post-judgment submission of respondents
10-14-82	Per Curiam order that petitioners' motion for leave to file comments on the September 1983 compliance date is granted and the Clerk is directed to file the lodged response to NHTSA's comments on the September 1983 effective date; Mikva and Edwards, CJs; and SCJ Bazelon
10-14-82	State Farm's memorandum in response to NHTSA's comments on the September 1983 effective date (m-8) - filed per above order
10-18-82	Per Curiam order, sua sponte, that the parties herein may file a reply to State Farm's memorandum on or before Monday, October 25, 1982; Mikva and Edwards, CJ's; and SCJ Bazelon
10-25-82	Petitioners' supplemental memorandum in response to NHTSA's 10-01-82 submission
10-28-82	Per Curiam order that petitioners' motion for leave to file comments on second post-judgment submission of respondents and of petitioners' lodged comments is granted and the Clerk is directed to file petitioners' lodged comments on second post-judgment submission of respondents; Mikva and Edwards, CJs and SCJ Bazelon

Date	FILINGS—PROCEEDINGS
11-02-82	Respondents' motion for leave to file response to petitioners' supplemental memoranda
11-09-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-354 (Motor Vehicle Manufactu[r]ing Assoc.) on 11-08-82
11-09-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-355 (Consumer Alert, et al.) on 11-08-82
11-09-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-398 (U.S. Dept. of Transportation, et al.) on 11-08-82
11-18-82	Per Curiam order, sua sponte, that the certified copy of judgment and copy of the opinion, issued in lieu of formal mandate to the National Highway Traffic Safety Administration on August 4, 1982, be and they are hereby recalled, and the National Highway Traffic Safety Administration is directed to return to this Court forthwith the documents issued in lieu of formal mandate; Mikva and Edwards CJs and SCJ Bazelon
11-19-82	Intervenor's (Automobile Importers) motion for expeditious consideration and a stay of enforcement of the Court's mandate and 08-04-82 order establishing a compliance date, pending Supreme Court review
11-23-82	Letter dated 11-23-82 from counsel for U.S. Dept. of Transportaion, et al. re-returning mandate per order dated 11-18-82
[12-8-82]	[Per Curiam order denying intervenor's motion for stay of enforcement and dismissing motion for expeditious consideration as moot]

[No.] 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS,
AUTOMOBILE OWNERS ACTION COUNCIL,
and EUGENE J. MEYUNG,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent.

AUTOMOBILE IMPORTERS OF AMERICA, INC.,
CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
MOTOR VEHICLE MANUFACTURERS ASSOC, *et al.*,
SUPERINTENDENT OF INSURANCE OF THE STATE OF N.Y.,

Intervenors.

Date	FILINGS—PROCEEDINGS
11-23-81	Petitioners' petition for review of an order of the NHTSA
11-25-81	Petitioners' motion for stay pending review (or, alternatively, for partial summary reversal) and for advancement of hearing date
12-01-81	Petitioners' motion to consolidate petitions for review Nos. 81-2220 & 81-2221 for purposes of hearing and decision
12-03-81	Clerk's order consolidating Nos. 81-2220 & 81-2221 on the merits and the time for filing a response to motion for stay is extended to 12/03/81
12-07-81	Per Curiam order denying motions for stay, Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921 (DC Cir. 1958) and briefing and hearing of these cases on the merits shall be expedited and these cases shall be scheduled

Date	FILINGS—PROCEEDINGS
	for argument on the Feb-March calendar, Feb. 11 - March 3, 1982 * * * The parties are instructed to address in their briefs the amount of time that will be required by the agency and by the affected automobile manufacturers to take appropriate action in the event that this Court invalidates in whole or in part the agency's rescission order of October 29, 1981; Wald (who did not participate), Mikva and Edwards, CJs
12-07-81	Certified List of the Administrative Record (consists of three large black binders)
12-28-81	Petitioners' brief
01-05-82	Intervenor's (Albert B. Lewis, Sup. Ins. of the State of NY) brief
01-25-82	Respondents' brief
02-01-82	Intervenors' (Motor Vehicle Manufacturers Assoc., et al.) brief
02-01-82	Intervenors' (Consumer Alert and Pacific Legal Foundation) brief
02-08-82	Petitioners' reply brief
02-09-82	Petitioners' (State Farm) reply brief
03-01-82	Argued before SCJ Bazelon; Mikva and Edwards*, CJ's
06-1-82	Opinion for the Court filed by Circuit Judge Mikva
06-1-82	Opinion concurring in part filed by Circuit Judge Edwards
06-1-82	Judgment that the orders of the NHTSA are vacated and the cases are remanded to NHTSA for further proceedings, in accordance with the opinions

Date	FILINGS—PROCEEDINGS
06-1-82	Per Curiam order by this Court, sua sponte, that the schedule for resolving questions which the Court's opinion filed herein this date directs respondent Administration to file (See page 76 of slip opinion), shall be filed and served upon counsel of record on or before July 1, 1982; further ordered sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing, see Local Rule 14, as amended on November 30, 1981.
07-01-82	Respondent's notice of filing that NHTSA intends to publish the attached notice of proposed supplemental rulemaking in the Federal Register
07-12-82	Respondent's motion to extend time to file petition for rehearing and/or suggestion for rehearing en banc
08-04-82	Per Curiam order that the motions for extension of time in which to file petitions for rehearing and/or rehearing en banc are denied; and that the period for filing timely petitions for rehearing and/or rehearing en banc having expired, the mandate in the above captioned case be issued accordingly; SCJ Bazelon, Mikva and Edwards, CJs (see attached memorandum)
08-04-82	Per Curiam order, sua sponte, that the compliance dates of Federal Motor Vehicle Safety Standard 208, the passive restraint standard, are stayed until 09/01/83 (Model Year 1984); and sua sponte, that respondent DOT has until 10/01/82, to advise the Court whether such a compliance date is

Date	FILINGS—PROCEEDINGS
	achievable, or whether a longer period is required, setting forth adequate reasons therefor; SCJ Bazelon, Mikva and Edwards, CJs (see attached memorandum)
08-04-82	Certified copy of judgment and opinion issued to NHTSA.
09-01-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on August 30, 1982 in SC No. 82-354 (Motor Vehicle Manufacturers Assoc.)
09-01-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on August 30, 1982 in SC No. 82-355 (Consumer Alert, et al.)
09-16-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on 09-08-82 in SC No. 82-398 (US Dept. of Transportation, et al.)
10-04-82	Respondents' memorandum in response to the court's 08-04-82 order
10-04-82	Petitioners' (State Farm Mutual Automobile Insurance Co., et al.) motion for leave to respond to NHTSA's comments on the September, 1983 compliance date
10-12-82	Petitioners' (National Association of Independent Insurers, et al.) motion for leave to file comments on second post-judgment submission of respondents
10-14-82	Per Curiam order that petitioners' (State Farm, et al.) motion for leave to respond to NHTSA's comments on the September 1983 compliance date is granted and the Clerk is directed to file the lodged memorandum in response to NHTSA's comments on the

Date	FILINGS—PROCEEDINGS
	September 1983 effective date; Mikva and Edwards, CJ's; and SCJ Bazelon
10-14-82	Petitioners' (State Farm, et al.) memorandum in response to NHTSA's comments on the September 1983 effective date (m-8) - filed per above order
10-18-82	Per Curiam order, sua sponte, that the parties herein may file a reply to State Farm's memorandum on or before Monday, October 25, 1982; Mikva and Edwards, CJ's; and SCJ Bazelon
10-21-82	Petitioners' supplemental memorandum
10-28-82	Per Curiam order that petitioners' motion for leave to file comments on second post-judgment submission of respondents and of petitioners' lodged comments is granted and the Clerk is directed to file petitioners' lodged comments on the second post-judgment submission of respondents; Mikva and Edwards, CJs and SCJ Bazelon
11-02-82	Respondents' motion for leave to file response to petitioners' supplemental memoranda
11-09-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-354 (Motor Vehicle Manufactu[r]ing Assoc.) on 11-08-82
11-09-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-355 (Consumer Alert, et al.) on 11-08-82

Date	FILINGS—PROCEEDINGS
11-09-82	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-398 (U.S. Dept. of Transportation, et al.) on 11-08-82
11-18-82	Per Curiam order, sua sponte, that the certified copy of judgment and copy of the opinion, issued in lieu of formal mandate to the National Highway Traffic Safety Administration on August 4, 1982, be, and they are hereby recalled, and the National Highway Traffic Safety Administration is directed to return to this Court forthwith the documents issued in lieu of formal mandate; Mikva and Edwards CJs and SCJ Bazelon
11-19-82	Intervenor's (Automobile Importers) motion for expeditious consideration and a stay of enforcement of the Court's mandate and 08-04-82 order establishing a compliance date, pending Supreme Court review
11-23-82	Letter dated 11-23-82 from counsel for National Highway Traffic Safety Administration returning mandate per order dated 11-18-82
[12-8-82]	[Per Curiam order denying intervenor's motion for a stay of enforcement and dismissing motion for expeditious consideration as moot]

Supreme Court of the United States

No. 82-354

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*

ORDER ALLOWING CERTIORARI. FILED November 8, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-355, *Consumer Alert, et al.* v. *State Farm Mutual Automobile Insurance Company, et al.* and case No. 82-398, *United States Department of Transportation, et al.* v. *State Farm Mutual Automobile Insurance Co., et al.*, and a total of one hour is allotted for oral argument.

Supreme Court of the United States

No. 82-355

CONSUMER ALERT, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*

ODER ALLOWING CERTIORARI. FILED November 8, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-354, *Motor Vehicle Manufacturers Association of the United States, Inc., et al.* v. *State Farm Mutual Automobile Insurance Company, et al.* and case No. 82-398, *United States Department of Transportation, et al.* v. *State Farm Mutual Automobile Insurance Co., et al.*, and a totoal of one hour is allotted for oral argument.

Supreme Court of the United States

No. 82-398

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, *et al.*

ORDER ALLOWING CERTIORARI. FILED November 8, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-354, *Motor Vehicle Manufacturers Association of the United States, Inc., et al.* v. *State Farm Mutual Automobile Insurance Company, et al.* and case No. 82-355, *Consumer Alert, et al.* v. *State Farm Mutual Automobile Insurance Company, et al.*, and a total of one hour is allotted for oral argument.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,

Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,

Respondents

SUPERINTENDENT OF INSURANCE OF STATE OF N.Y., *et al.*,

Intervenors

AND CONSOLIDATED CASE No. 81-2221

[FILED NOV 18 1982]

BEFORE: Mikva and Edwards, Circuit Judges; and Bazelon, Senior Circuit Judge

ORDER

It appearing that a writ of certiorari has been issued to this Court with respect to the captioned cases, it is

ORDERED, by the Court, *sua sponte*, that the certified copy of judgment and copy of the opinion, issued in lieu of formal mandate to the National Highway Traffic Safety Administration on August 4, 1982, be, and they are hereby recal-

led, and the National Highway Traffic Safety Administration is directed to return to this Court forthwith the documents issued in lieu of formal mandate.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,

Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,

Respondents

SUPERINTENDENT OF INSURANCE OF STATE OF N.Y., *et al.*,

Intervenors

AND CONSOLIDATED CASE No. 81-2221

[FILED DEC 8 1982]

BEFORE: Mikva and Edwards, Circuit Judges; and Bazelon, Senior Circuit Judge

ORDER

Upon consideration of the motion filed by intervenor Automobile Importers of America for expeditious consideration and for a stay of enforcement, pending Supreme Court review, of this Court's mandate and of the order entered August 4, 1982 establishing a compliance date, and of the letter from counsel for intervenor dated November 19, 1982, and it appearing that the Supreme Court of the United States has issued writs of certiorari in these cases and this Court has recalled its mandate, it is

ORDERED, by the Court, that intervenor's motion for a stay of enforcement is denied; and, it is

FURTHER ORDERED, by the Court, that intervenor's motion for expeditious consideration is dismissed as moot.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Office - Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Of Counsel:
DONALD P. MCHUGH
Vice President and
General Counsel
State Farm Mutual
Automobile Insurance Co.

* *Counsel of Record*

JAMES F. FITZPATRICK *
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724
Attorneys for Respondents State Farm Mutual Automobile Insurance Company, et al.

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QUESTION PRESENTED

Whether the decision by the National Highway Traffic Safety Administration to revoke the "passive restraint" requirements of Federal Motor Vehicle Safety Standard 208 was arbitrary and capricious.

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* Pursuant to Rule 28.1, respondent State Farm states that it has no parent companies, subsidiaries other than wholly owned subsidiaries, or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-354, 82-355, 82-398

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondents State Farm Mutual Automobile Insurance Company, Kent Mason, Patricia Warren and Leorlin Boyd respectfully request the Court to deny the petitions for writs of certiorari to review the judgment, opinion and order of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT OF THE CASE

In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. §§ 1381 *et seq.*, in order "to reduce traffic accidents and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. One of Congress' principal concerns in passing the Safety Act was the " 'second collision'—the

impact of the individual within the vehicle against the steering wheel, dashboard, windshield, etc."—after the first collision between the automobile and another object. S. Rep. No. 1301, 89th Cong., 2d Sess. 3 (1966). Accordingly, one of the Department of Transportation's ("DOT") first actions in implementing the Act was the promulgation, in 1967, of Federal Motor Vehicle Safety Standard 208, which required the installation of seat belts in all passenger cars. 32 Fed. Reg. 2408 (Feb. 3, 1967). By preventing or minimizing the impact of the "second collision," such devices substantially reduce the risk of death or serious injury in traffic accidents. NHTSA Reg. Analysis at IV-8 (October 1981) (JA 64).[1]

It soon became clear to DOT, however, that although the existing manual belts could drastically reduce deaths and injuries if used, "only a very low percentage of the motoring public" were fastening their belts. Therefore, the Department concluded, "the interests of motor vehicle safety demand the prompt installation of passive restraint systems"—*i.e.*, systems which do not require any affirmative action by the occupant (for example, buckling a belt) to be effective. 34 Fed. Reg. 11,148 (July 2, 1969). In 1969, DOT issued a notice of proposed rulemaking on the subject of passive restraints. *Id.* And in 1972, after three years of study, the Department issued a final amendment to Standard 208, requiring the installation of passive restraint systems in vehicles manufactured after August 15, 1975. In the interim period, from August 1973 until August 1975, manufacturers were permitted to install either passive restraints, or manual belts coupled with ignition interlocks which prevent the car from starting

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[1] "JA" refers to the Joint Appendix filed by the parties in the court below. "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the Motor Vehicle Manufacturers Association.

unless the belt is fastened. 37 Fed. Reg. 3911 (Feb. 24, 1972).

The automobile manufacturers immediately filed suit to challenge the rule, and in *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (1972), the Sixth Circuit upheld the passive restraint standard. However, because the court found that DOT had used an invalid "anthropomorphic test device" in setting performance specifications for restraint systems, the court stayed the effectiveness of the rule pending correction of the error. *Id.* at 681. In the meantime, the manufacturers had chosen to comply with Standard 208's interim requirements by installing ignition interlocks rather than passive restraints, and the public had become increasingly irritated at not being able to start their cars without fastening their belts. This led Congress to ban the interlock requirement. *See State Farm* v. *DOT*, 680 F.2d 206, 210 (D.C. Cir. 1982); 15 U.S.C. § 1410b(b)(1). Neither Congress nor the Sixth Circuit, however, rejected the passive restraint standard itself.

In 1976, DOT Secretary William Coleman again confirmed that passive restraints "are a reliable and effective means of substantially reducing deaths and injuries on the nation's highways." The Secretary's Decision Concerning Crash Protection 10 (Dec. 6, 1976) (JA 2068). However, he determined that the public needed more experience with passive restraints before making them mandatory. *Id.* at 6 (JA 2073). Accordingly, he launched a demonstration program, contemplating contracts with the automakers for the production of up to 250,000 passive-equipped vehicles per year. *Id.* at 8 (JA 2075).

In 1977, DOT again instituted a passive restraint rulemaking, and on July 5 issued a final, mandatory schedule for the installation of passive restraints. Giving the automakers over four years lead time, the final schedule required installation of passive restraints in large cars by September 1, 1981, in mid-size cars by September 1, 1982,

and in small cars by September 1, 1983. 42 Fed. Reg. 34,289. A judicial challenge was again filed, and the court (this time the D.C. Circuit) again upheld the passive restraint standard. *Pacific Legal Foundation* v. *DOT*, 593 F.2d 1338, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). Congress declined to exercise its legislative veto, and the Senate committee with jurisdiction over the National Highway Traffic Safety Administration ("NHTSA") affirmatively endorsed the standard. S. Rep. No. 481, 95th Cong., 1st Sess. (1977).

In the years since the first notice of rulemaking was issued in 1969, a wide variety of passive restraint systems have been installed in American automobiles and shown to work effectively. Between 1972 and 1976, approximately 10,000 GM vehicles were equipped with airbags, which are stored in the dashboard and inflate upon impact to protect the rider from collision with the car's interior. 42 Fed. Reg. at 34,290. Because these devices provide automatic protection and cannot be deactivated, they have "100%" usage rates. As the Department of Justice told the Court of Appeals in 1977, the fleetwide installation of airbags would save 9,000 lives and prevent 65,000 injuries per year. Brief for the Dept. of Justice, *Pacific Legal Foundation* v. *DOT* at 61.

Since 1975, automatic seat belts, which move into place automatically (without "buckling up") as the passenger enters the vehicle and closes the door, have been installed in over 350,000 Volkswagen Rabbits, and in 8,000 1978 and 1979 GM Chevettes. NHTSA Reg. Analysis at IV-29 (Oct. 1981) (JA 85); NHTSA Hearing Tr. at 82 (Aug. 5, 1981) (JA 2549). Approximately 13,000 1980 GM Chevettes were also equipped with automatic belts, 46 Fed. Reg. 53,419, 53,421 (Pet. App. 98a); NHTSA Hearing Tr. at 82 (JA 2549), as were 1980 Toyota Coronas (as an option) and 1981 Toyota Cressidas (as standard equipment) (JA at 1628). NHTSA has described all of these automatic belt designs as either practically or literally "nondetachable." 46 Fed. Reg. at 53,421 (Pet.

App. 98a).[2] In the case of the 1980 Chevettes and 1980-81 Toyotas, there is no "buckle" at all—egress may be obtained either by opening the door (which "opens" the belt) or, in an emergency, by a device which permits the occupant to "spool out" the belt and create the necessary slack.

Every study conducted by NHTSA of automatic belt systems already in service has revealed usage rates of at least 70%, which is approximately 40 percentage points above the rate of use of manual belts in the same models. 46 Fed. Reg. at 53,421 (Pet. App. 96a); NHTSA Reg. Analysis at IV-52 (JA 108). According to NHTSA's most recent estimates, these levels of increased belt usage could prevent some 7,000 additional fatalities and 130,000 additional injuries over the lifetime of the automobiles sold in each model year. NHTSA Reg. Analysis at IV-61, 62 (JA 117, 118).

Thus, on the eve of the deadline for commencing the mandatory installation of passive restraints—September 1, 1981—a wide variety of restraint technologies had already been utilized by the automakers and proven effective. Indeed, the manufacturers had already expended a substantial portion of the capital investment necessary to meet the deadline. 680 F.2d at 213. Moreover, every Secretary of Transportation since 1969 had agreed that installation of such devices would save countless lives. Yet in February 1981—barely three weeks into a new Administration—DOT Secretary Lewis set in motion the administrative process that would ultimately lead to abandonment of the government's longstanding commitment to passive restraints.

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[2] The terms "detachable" and "nondetachable" as used by NHTSA are somewhat misleading, since most passive restraint systems now in use have some detachable feature. The VW Rabbit system is detachable but guarded by a starter interlock. GM's Chevette system can also be partially detached.

The effort began with a proposal to postpone the implementation date by one year. The express justification was the economic "difficulties of the automobile industry and some of its members." 46 Fed. Reg. 12,033 (Feb. 12, 1981). Two months later, the agency adopted the delay proposal, again stressing the "economic situation of the industry." 46 Fed. Reg. 21,172, 21,174 (April 9, 1981). The same day, NHTSA proposed the rescission of the entire Standard. 46 Fed. Reg. 21,205 (April 9, 1981). Both decisions were announced by the White House Press Office as part of a larger package of "Actions to Help the U.S. Auto Industry," at A-34 (April 6, 1981) (JA 1281, 1321).

The rescission proposal attracted numerous public comments, including three cost-benefit analyses performed by professional economists (JA 511, 606, 714). All three confirmed that the benefits of the Standard far exceeded its costs, precisely the same conclusion that NHTSA itself had reached prior to the 1981 rulemaking. *See, e.g.*, Coleman Decision, *supra* at 49 (JA 2116) (3.5 benefit/cost ratio for passive belts). Indeed, Professor William Nordhaus of Yale University concluded that implementation of the Standard would ultimately save thousands of lives and prevent tens of thousands of injuries per year, and would produce net economic benefits to society of $2.4 billion per year and $33 billion cumulatively over time. Nordhaus Comment at 1 (May 1981) (JA 511).

Notwithstanding these findings, the new NHTSA Administrator rescinded the rule on October 29, 46 Fed. Reg. 53,419—against the unanimous opposition of his own senior staff, *see* 680 F.2d at 240 n.44; *Chicago Sun Times*, November 28, 1981 at 21. This time, however, the asserted justification was neither the economic state of the auto industry, nor—perhaps due to the economists' calculations—an unfavorable cost-benefit analysis. Rather, the rescission was now premised almost entirely on the fact that some manufacturers had threatened to meet the

Standard by using an entirely new, so-called "detachable" automatic belt. Unlike any passive restraint device in use prior to 1981, NHTSA suggested, the new design permitted the occupant to separate or "detach" the system with such relative ease as to apparently invite disuse. Although six months before the agency had described these devices as "poorly designed," NHTSA Reg. Impact Analysis at V-24 (April 1981), NHTSA now cited this development as the basis for rejecting its prior studies of automatic belt systems as irrelevant. 46 Fed. Reg. at 53,420-21 (Pet. App. 92a, 97a). Instead of adopting the obvious suggestion pressed in the rulemaking—that NHTSA bar the new, easily detachable belt as a means of complying with the Standard—the agency simply completed the course set in motion in February 1981, and abandoned the Standard altogether.

The respondents in the present action—joined as amici curiae by the American College of Preventive Medicine, the Epilepsy Foundation and the United Auto Workers, among others—petitioned for review in the District of Columbia Circuit. Reviewing the entire 12-year rulemaking record, the Court of Appeals found the agency's decision to revoke the Standard "a paradigm of arbitrary and capricious agency action because NHTSA drew conclusions that are unsupported by evidence in the record and then artificially narrowed the range of alternatives available to it under its legislative mandate." 680 F.2d at 208-09. The only explanation the court could find for the agency's action was that its "analysis . . . has been distorted by solicitude for the economically depressed automobile industry—which is not the agency's mandate—at the expense of consideration of traffic safety, which is." 680 F.2d at 240. As Judge Edwards said in concurrence, "the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand." *Id.* at 242. Accordingly, the court vacated the rescission and remanded the matter to the agency. Pet. App. 161a.

REASONS FOR DENYING THE WRIT

In order to attract this Court's attention, petitioners have attempted to portray the court below as having applied an inappropriate standard of review to the agency actions at issue in this case. The facts, however, are to the contrary. As the Court of Appeals expressly stated, it applied the traditional standard for review of informal rulemaking: "the familiar 'arbitrary and capricious' test." 680 F.2d at 218. Moreover, as the court also noted, NHTSA's action in this case would have failed to survive under "*any* measure of reasoned decisionmaking," however narrow. *Id.* at 239 (emphasis added).

Regardless of how many times petitioners may choose to repeat the word, this is *not* a case about agency decisionmaking under conditions of "uncertainty." Rather, the results of NHTSA's own studies of technology *already in use* clearly demonstrate that the agency's rescission will lead to thousands of otherwise preventable traffic fatalities and tens of thousands of additional injuries each year. Rescission will also impose *net* economic costs on society of approximately $2.4 billion per year. And it will not appreciably help the automakers, who would have been able to shift most of the costs of passive restraints—which amount to approximately $89 per car—to the ultimate beneficiaries of improved safety, the purchasers of automobiles. Indeed, the evidence in favor of the passive restraints rule was so strong that NHTSA's entire senior staff opposed rescission.

The question presented here is not what standard of review a court should *theoretically* apply to agency decisionmaking, but rather whether the action taken by *this* agency in *this* case was arbitrary and capricious. On the basis of the entire 12-year rulemaking record, the court below found that it was. And, as this Court has stated on numerous occasions, that kind of fact-based determination is one "which Congress has placed in the keeping of the Courts of Appeals," and to which this Court will normally defer. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283,

310 (1974). It plainly is not the kind of issue worthy of certiorari—particularly not when granting the writ could well lead to yet another delay in preventing needless injury and death.

I. THE COURT OF APPEALS APPLIED THE TRADITIONAL STANDARD APPROPRIATE FOR REVIEW OF INFORMAL RULEMAKING: THE "ARBITRARY AND CAPRICIOUS" TEST

A. The Standard

The standard of review appropriate for the informal rulemaking conducted by NHTSA in this case is well-recognized. The Safety Act expressly provides that both the procedural and judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*; 5 U.S.C. §§ 701 *et seq.*, "shall apply to all orders establishing, amending, *or revoking* a Federal motor vehicle safety standard," 15 U.S.C. § 1392(b) (emphasis added). Therefore, "agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414 (1971), *citing* 5 U.S.C. § 706(2)(A).

That is precisely the standard of review that the court below applied in this case. No less than eight times the court either explained that "the familiar, 'arbitrary and capricious' test" applied, 680 F.2d at 218, or used those express terms to analyze NHTSA's actions. *See, e.g.*, 680 F.2d at 208, 218, 229, 230, 233, 236, 239, 240. Moreover, the court was clearly aware of the limited role it played under that test. As it explained, application of that test

> "does not mean that NHTSA may not revoke the standard. If the agency clearly articulates a reasonable basis for that action, we must defer to the policy judgments and expertise of the agency. By no means may we substitute the court's judgment, or fail to 'guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" 680 F.2d at 229.

Contrary to the disingenuous assertion of the Motor Vehicle Manufacturers Association ("MVMA"), the court did *not* state that it was applying an "unusual" expansion of the arbitrary and capricious standard. MVMA Pet. at 12.[3] Although the court found the scope of review "a question of some complexity," 680 F.2d at 218, that complexity was engendered by MVMA's surprising suggestion that NHTSA's revocation of its final passive restraints rule was "substantially the same" as an agency's refusal to promulgate a rule in the first place—and thus was "close to the borderline of nonreviewability." MVMA Brief at 18 (February 1, 1982). The Court of Appeals correctly rejected MVMA's theory for three reasons.

First, the Safety Act expressly equates an order "revoking" a safety standard with one "establishing" such a standard for purposes of rulemaking procedure and judicial review. 15 U.S.C. § 1392(b). *Accord*, 5 U.S.C. § 551(5) (Administrative Procedure Act). Because a revocation order is a "rule" which may not be issued without rulemaking procedures, *see NRDC* v. *EPA*, No. 81-2068 at ¶ 25 (3d Cir., July 8, 1982), the "arbitrary and capricious" standard applies, *see generally FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 803 (1978).

Second, as the Court of Appeals pointed out, a revocation is substantially different than a mere failure to act, because revocation constitutes a *reversal* of the agency's former views as to what course is both in the public interest and consistent with the intent of Congress. Indeed, in this case revocation was a reversal both of NHTSA's 12-year affirmation of the efficacy of passive

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[3] What the court said, was that it "may seem unusual to discuss [the] legislative history before" discussing the standard of review—not that the standard it adopted was itself "unusual." 680 F.2d at 222. As explained *infra*, that unusual order of discussion was necessitated by MVMA's assertion that a test *even narrower* than "arbitrary and capricious" was appropriate for this case.

restraints, and of the implementation order in effect since 1977. As the court noted, a long line of opinions call for "judicial vigilance" in such circumstances to insure that "an agency changing its course . . . suppl[ies] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . ." 680 F.2d at 220, *quoting Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (Leventhal, J.), *cert. denied*, 403 U.S. 923 (1971). *See Atchison, Topeka & Santa Fe Ry Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973); *NLRB* v. *Weingarten*, 420 U.S. 251, 268 (1975) (Burger, C.J., dissenting); *NRDC* v. *EPA*, No. 81-2068 at ¶¶ 21-22 (3d Cir. 1982). These considerations are simply inapplicable to cases of agency inaction.

Finally, as the Court of Appeals also explained, this case involves not just any reversal, but rather the reversal of a long-standing agency rule that had been repeatedly brought to Congress' attention and never changed by it. As both this Court and the courts of appeals have held, that kind of history is useful in determining which course is most consistent with the will of the legislature. *See United States* v. *Rutherford*, 442 U.S. 544, 553, 554 & n.10 (1979); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 413-14 (1961); *Roadway Express* v. *NLRB*, 647 F.2d 415, 419-20 (4th Cir. 1981). While the court recognized that such history neither "carries the weight of positive law" nor "mean[s] that NHTSA may not revoke the standard," the court rightly concluded that it justifies treating the revocation as something quite different than a mere refusal to act. 680 F.2d at 228, 229.

B. The Standard as Applied

As discussed in detail in part II *infra*, the Court of Appeals found NHTSA's revocation arbitrary and capricious for two independent reasons: the agency failed to consider obvious alternatives to revocation, and the

agency lacked any support in the record for its final decision to revoke the rule. 680 F.2d at 230. Petitioners have professed doubts as to the significance of both of these failings. Such doubts are plainly unwarranted.

As already noted, NHTSA's principal reason for revoking the Standard was its lack of faith in the efficacy of the new detachable belts which the automakers had threatened to install if forced to comply with the rule. However, as the Court of Appeals found, NHTSA did not "devot[e] even a modicum of reasoned analysis to several far more obvious possible" alternatives to rescission, including amending the Standard to eliminate compliance by these kinds of belts. 680 F.2d at 233. Quoting Judge Wilkey's 1973 opinion in *Pillai* v. *CAB*, 485 F.2d 1018, 1027 (D.C. Cir.), the court below found that kind of "artificial narrowing of options" to be "arbitrary and capricious." 485 F.2d at 1027; 680 F.2d at 233.

As Judge Wilkey explained in *Pillai*, an agency's failure to "rationally choose among the possible alternatives" may be viewed "as either an unsupported exercise of discretion or an arbitrary failure to exercise discretion at all." 485 F.2d at 1029, 1030. *See United States* v. *Nova Scotia Food Products Corp.*, 56[illegible] F.2d 240, 253 (2d Cir. 1977). This Court reached the same conclusion in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 165-69 (1962), where it set aside an ICC order because the agency failed to state a rational basis for its choice of one action when another alternative was also available. "The agency," said Justice White, "must 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *Id.* at 168.

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1977), relied upon by petitioners, is not to the contrary. That case did not hold that an agency need not consider alternatives to its chosen regulatory policies. U.S. Pet. at 26; MVMA Pet. at 22 & n.41. Rather, the Court held that an agency "cannot be found wanting

simply because the agency failed to include *every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been . . . .*" *Id.* at 551 (emphasis added). That is hardly the situation here. As the Court of Appeals explained, NHTSA's error was not a failure to consider "uncommon or unknown" alternatives, but rather its failure "to consider or analyze *obvious* alternatives to rescission." 680 F.2d at 230 (emphasis added). Since both nondetachable belts and airbags had already been effectively used in thousands of automobiles, and indeed were the very devices that—until the last minute—everyone had expected the automakers to use, there could not have been any more obvious alternatives available for consideration by the agency.

The second, wholly independent ground for the Court of Appeals' decision, was the absence of even "one iota of evidence to support NHTSA's conclusion that [the passive restraints] Standard as written will fail to . . . lead to safety benefits that exceed [its] relatively small marginal costs." 680 F.2d at 231. It can hardly be doubted that such a complete lack of record support renders an agency action "irrational" and hence "arbitrary and capricious." *First Girl, Inc.* v. *Regional Manpower Administrator*, 499 F.2d 122, 124 (7th Cir. 1974); *API* v. *Knecht*, 609 F.2d 1306, 1310 (9th Cir. 1979), *aff'g* 456 F. Supp. 889, 905 (C.D. Cal. 1978). Because petitioners cannot dispute that point, they have instead attempted to characterize the Court of Appeals' opinion as having reversed the "burden of proof" by forcing the agency to prove the ineffectiveness of the Standard. PLF Pet. at 8.

There was no such shifting of the burden in this case. Indeed, the court below recognized that it "must defer to the policy judgments and expertise of the agency." 680 F.2d at 229. Although the court did state that "NHTSA has some burden . . . to show that a regulation once considered to prevent death and injuries efficiently

can no longer be expected to do so," *id.* at 231, in context it is plain that it did not mean to shift any technical "burden" by the use of that phraseology.

The question before the court was whether even a standard which permitted compliance by detachable belts would lead to substantially increased belt usage (and hence protection from injury). Already on the record were three key facts: (1) every previous study of every kind of passive restraint already in use had shown substantial safety benefits; (2) attitude surveys conducted by NHTSA itself suggested that these same results would be applicable to detachable belts; and (3) the agency's long-standing view had been that the Standard would be effective. 680 F.2d at 231. It was in that context, and in the light of that evidence already weighing heavily against NHTSA's decision, that the court quite reasonably expected NHTSA to come forward with some evidence in support of its decision. Such evidence, the court took pains to note, did not have to consist of "statistical data"; "logical argument" would suffice instead. But, said the court, there "must be *some* reason to support *any* reasoned decision." 680 F.2d at 231 (emphasis in original).

Thus, viewed in the context of an agency's decision to reject its former conclusions, despite the record evidence which still supported those conclusions, the court's language requiring some evidence or argument on the other side can hardly be read as a shift in the burden of proof. Indeed, this Court used remarkably similar language in dealing with another agency's reversal of course. In *Atchison, Topeka & Santa Fe Ry Co.*, an opinion much-cited by the petitioners, this Court explained:

> "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a *presumption* that those policies will be carried out best if the settled rule is adhered to. *From this presumption flows the*

agency's duty to explain its departure from prior norms." 412 U.S. at 807-08 (emphasis added).

Surely neither this Court's use of the words "presumption" and "duty," nor the Court of Appeals' use of the word "burden," were intended to reverse any technical "presumptions" or "burdens of proof" applicable to judicial review of agency action.

* * * *

The MVMA has contended that the opinion below will make it more difficult to deregulate an area of commerce than to regulate it in the first place. MVMA Pet. 17-25. As the foregoing analysis reveals, nothing could be further from the truth. The Court of Appeals applied precisely *the same* test to an agency's decision to deregulate as it would have applied to an agency's decision to regulate: the "arbitrary and capricious" test. No preference for one over the other was shown.[4] Subsequent District of Columbia cases citing the opinion below, including one decided by a member of the same panel, make that clear. *See NAACP* v. *FCC*, No. 80-2416 (D.C. Cir., June 29, 1982); *ILGW* v. *Donovan*, No. 81-2606 (D.D.C., July 23, 1982). Indeed, in *ILGW* v. *Donovan*, the court expressly stated that "in the recent case of *State Farm* v. *DOT* . . . the rescission of the passive restraint regulation was held to be subject to the same standard of review as was the regulation's original promulgation . . . the arbitrary and capricious standard . . . ." Slip op. at 8. That was also the law prior to the decision below, both in the D.C. Circuit, *see National Tour Brokers Ass'n* v. *ICC*, 671 F.2d 528, 532 (1982), and in other circuits, *see, e.g., Malrite T.V. of New York* v. *FCC*, 652 F.2d 1140, 1149 (2d Cir. 1981).

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[4] Indeed, members of the panel which unanimously vacated NHTSA's attempt at "deregulation" in this case, have shown themselves quite willing to affirm agency deregulation when it is not arbitrary and capricious. *E.g., NAACP* v. *FCC*, No. 80-2416 (June 29, 1982); *Washington Ass'n for Television & Children* v. *FCC*, 665 F.2d 1264 (1981).

The question presented in this case is not—as the petitioners would have it—whether regulation or deregulation is a more blessed state of being. The real question is whether, on the specific facts of this case, NHTSA's cancellation of its passive restraint rule was a rational exercise of the agency's discretion. As this Court has often repeated, that kind of fact-based inquiry is one which "Congress has placed in the keeping of the Courts of Appeals," and in which "[t]his Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *FPC*, 417 U.S. at 310. *See American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). As the following analysis of the facts actually before the Court of Appeals makes manifest, this is not that kind of case.

II. ON ANY STANDARD OF REVIEW, NHTSA'S DECISION WAS AN ABUSE OF DISCRETION AND SHOULD HAVE BEEN VACATED

Although the Court of Appeals took pains to specify the appropriate standard of review for this case, after examining the factual record, it found NHTSA's analysis so poor that it would have failed "any measure of reasoned decisionmaking." 680 F.2d at 239. The court found that to be so for two wholly independent reasons.

A. It Was an Abuse of Discretion To Rescind Based on a New, Allegedly Ineffective Belt Design When Effective Belts Were Already in Service

As its legislative history makes abundantly clear, the Safety Act was enacted out of Congress' belief that the automakers' voluntary efforts to improve automobile safety had "largely failed." "The only course commensurate with the highway death and injury toll," said the Senate Committee on Commerce, was the "unconditional imposition of mandatory standards at the earliest possible date." S. Rep. No. 1301, *supra* at 4. Accordingly, the

Act directs that the Secretary of Transportation "shall" establish mandatory Motor Vehicle Safety Standards. 15 U.S.C. § 1392(a).

"[S]afety," said the Congress, was to "be the overriding consideration in the issuance of [the] standards." S. Rep. No. 1301 at 6. *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). Those standards were to be performance standards, concentrating not on the design of a particular safety device, but rather on the required minimum level of safety improvement it must attain. S. Rep. No. 1301 at 6. Moreover, because Congress had become disenchanted with the voluntary efforts of the automakers, it intended the standards to be "technology forcing." That is, they were to go beyond existing technology and were "to impel automobile manufacturers to develop and apply new technolog[y] to the task of improving the safety design of automobiles as readily as possible." *Chrysler Corp. v. DOT*, 472 F.2d 659, 671-72 (6th Cir. 1972). *See* S. Rep. No. 1301 at 1, 10. As the Department of Justice explained to the Sixth Circuit, an "important reason for passage of the [Safety] Act was to insure that the pace of safety measures would *not* be left to industry." Brief for the Department of Justice, *Chrysler Corp.* v. *DOT* at 62 (emphasis in original).

But in this case, it was not even necessary to compel the development of new technology: passive restraint devices already in service in thousands of cars had been shown to be effective in NHTSA's own studies. By the agency's analysis, if installation of a restraint device could increase usage by just 13 percentage points over current manual belt use, the standard's benefits would outweigh its costs. NHTSA Reg. Analysis at A-10 (Oct. 1981) (JA 284); 680 F.2d at 215. Yet, NHTSA's surveys of automatic belt systems already installed in thousands of GM and VW automobiles revealed that these devices increased belt use by over 40 percentage points, roughly three times the break-even level. 46 Fed. Reg. at 53,421 (Pet. App. 96a); NHTSA Reg. Analysis

at IV-52 (JA 108). The agency calculated that increases of this magnitude would prevent approximately 7,000 deaths and 130,000 injuries each year, as compared to the results if the present manual belts were left in place. NHTSA Reg. Analysis at IV-61, 62 (JA 117, 118). And Professor Nordhaus calculated that the *net* economic benefits to society would be $2.4 billion per year and $33 billion over time. Nordhaus Comment at 1 (May 1981) (JA 511). Moreover, virtually all of the costs of automatic belts—about $89 per car—could be passed on by the automakers to the beneficiaries of improved safety, *i.e.*, the purchasers of automobiles. NHTSA Reg. Analysis at VI-25 (JA 187). They, in turn, could more than make up that cost through reductions in automobile insurance. 680 F.2d at 240 n.43; NHTSA Reg. Analysis at V-7, 9 (JA 155, 157).

Despite all of the evidence generated by NHTSA in favor of its passive restraint standard, Administrator Peck revoked the rule on October 29, 1981. The key rationale was a "drastic change" in the plans of the automakers: some had threatened to meet the standard by using an entirely new, "detachable" automatic belt.[5] "[U]nlike the automatic belts in Rabbits and Chevettes," NHTSA said, the new belts "would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently."[6] Hence, "[i]nstead of being equipped with automatic restraints that will protect substantially greater numbers of persons

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[5] Because the automatic belts already on the road had been proven cost-effective, it was this change in kinds of automatic belts, and not the shift from airbags to belts, that was important. *Compare* MVMA Pet. 6, 7. Nor was the public's switch from large to small cars of any import, since NHTSA is on record as believing that small car buyers are even more likely to accept and use automatic restraints than large car buyers. 46 Fed. Reg. at 53,421 (Pet. App. 98a). *Compare* MVMA Pet. 6 n.13.

[6] This assertion gave the Court of Appeals serious doubts as to whether the detachable belts complied with the passive restraints Standard at all. 680 F.2d at 234.

than current manual belts, most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts." 46 Fed. Reg. at 53,421, 53,420 (Pet. App. 97a, 92a). Although in April 1981 this very analysis had led the agency to characterize detachable belts as "poorly designed," NHTSA Reg. Impact Analysis at V-24 (April 1981) (JA 2548), in October it seized on the change as a reason for rejecting as irrelevant its prior tests on other designs. 46 Fed. Reg. at 53,421-22 (Pet. App. 97a-99a).

It is hardly surprising that the Court of Appeals found "the absurdity of this Orwellian reasoning obvious." 680 F.2d at 234. The agency had simply turned the Safety Act on its head. Instead of forcing the industry to develop new and *better* technology, it had surrendered to the automakers' threat to use technology *worse* than that already on the road. Instead of insisting on a performance standard requiring a certain level of safety results, it retreated before an eleventh hour industry decision to use a design which was worse than alternatives known to meet the performance criteria. Hence, this is not, as petitioners attempt to portray it, a case in which NHTSA exercised its discretion in a reasonable, if debatable, fashion. Here, the agency failed to exercise its discretion at all, *see Burlington Truck Lines*, 371 U.S. at 168, and instead transferred it wholesale to the very industry it was charged with regulating.

NHTSA had, of course, obvious alternatives to such capitulation. Chief among these was barring compliance by the new type of detachable belt, which would still have permitted compliance by a wide variety of other belt designs as well as airbags.[7] Yet, as the Court of

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[7] Although the Solicitor General suggests that had NHTSA adopted that alternative, it "may have faced challenges from the manufacturers and others" on the ground that barring detachables was not proposed in the Notice of Proposed Rulemaking, the agency itself did *not* make that argument in support of its decision

Appeals discovered, NHTSA did not "devot[e] even a modicum of reasoned analysis" to this alternative, "summarily reject[ing]" it in three paragraphs. 680 F.2d at 233; 46 Fed. Reg. at 53,424 (Pet. App. 109a-110a). As the court noted, the agency's reasons can only be characterized as "hollow" and "capricious." 680 F.2d at 233, 234.

Before examining those reasons, however, the various petitioners' "statements of fact" require that some attention be paid to what the agency did *not* say. NHTSA did *not* say that even the "*non*detachable" belts now on the road would generate "uncertain" benefits, and that therefore there was no reason to insist on any passive restraint standard at all. Although the agency did note that there were "demographic" difficulties in extrapolating to other cars the large increases in usage shown in restraint-equipped Rabbits and Chevettes, in the end NHTSA conceded that "*most* of the increase in automatic belt [use] in Rabbits and Chevettes is due to the nondetachability feature" and that only 1/5 of the increase could be attributed to demographics. 46 Fed. Reg. at 53,422 (Pet. App. 102a). The remaining 4/5 was more than enough to make the nondetachable belts cost-effective. *See supra* p. 17. Hence, the theoretical arguments raised on appeal regarding the latitude which must be given agencies operating under conditions of uncertainty are simply irrelevant to the facts of this case. *Compare* U.S. Pet. 19.

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to rescind. In fact, as discussed *infra* the agency actually *did* consider barring detachables, albeit summarily. As this Court has instructed, the Solicitor's *post hoc* rationalizations should be given no weight. *American Textile Mfrs. Inst.*, 452 U.S. at 539. Moreover, such challenges would have been clearly without merit. NHTSA's Notice of Proposed Rulemaking did in fact call for public comment to identify the "most effective and reasonable approach to addressing the safety problems posed by the low rate of safety belt use," 46 Fed. Reg. at 21,206 (JA 13), and its Final Notice acknowledges that several commentators complied by suggesting—on the public record—that detachable belts be barred. 46 Fed. Reg. at 53,424 (Pet. App. 109a).

The three reasons NHTSA did give for failing to bar the new detachable belts were indeed "capricious." First, it said that Congress' 1974 rejection of the interlock feature "suggests that Congress would look with some disfavor" on other use-compelling features, e.g., nondetachability. 46 Fed. Reg. at 53,424 (Pet. App. 109a). But, as the Court of Appeals' review of the legislative history makes clear, "[t]here is absolutely no evidence to support such a conclusion; indeed, every indication in the record points the other way." 680 F.2d at 234, 235.[8] Second, NHTSA reported that "[r]ecent attitudinal research" it had conducted indicated a "widespread, latent and *irrational* fear in many members of the public that they could be trapped by the seat belt after a crash," and the agency did not want to impose a technology that would "trigger" that fear. *Id.* (Pet. App. 110a) (emphasis added). However, as the court below discovered, the "research" cited for this proposition—which surveyed users of *manual belts* only—disclosed that *only 7%* of the respondents had cited this fear. 680 F.2d at 235 n.34, *citing* JA 1108.

Finally, NHTSA offered a third rationale, although it was unwilling to advance it except by implication. While it said it did not want to impose a requirement that would "complicate" emergency egress from a vehicle, the agency did not take the next step and say that nondetachable belts would in fact complicate egress. 46 Fed. Reg. at 53,424 (Pet. App. 110a). As the Court of Appeals noted, there is *no* evidence suggesting that emergency release from nondetachable belts is any more difficult than from detachable belts; in fact, the evidence is all to the contrary. 680 F.2d at 236. GM has twice stated emphatically that nondetachable belts with spool-out releases are as safe as detachable belts in terms of emergency egress,

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[8] Although Congress could have banned passive restraints at the same time it banned interlocks, it took care not to do so. Moreover, what Congress objected to about interlocks—the fact that they require affirmative action in order to start the car—is simply not a problem with automatic belts. 680 F.2d at 235.

NHTSA Hearing Tr. at 95 (Aug. 5, 1981) (JA 1225-26); 43 Fed. Reg. 21,912, 21,914 (May 22, 1978) (JA 1724-25), and NHTSA itself has agreed, stating that it does "not believe that the use of [such] mechanisms will cause serious occupant egress problems. . . ." 43 Fed. Reg. 52,493, 52,494 (Nov. 13, 1978) (JA 1706).[9]

In short, by its decision in this case, NHTSA abandoned a 12-year commitment to auto safety because the industry it was instructed by Congress to regulate threatened to comply with such regulation by installing devices which constituted the "worst available technology." Moreover, the agency then rejected the obvious alternatives to abandonment on the basis of arguments lacking any support in the record. "Arbitrary" and "capricious" are, if anything, gentle words to apply to that kind of decision-making.

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[9] Three other makeweight arguments against passive belts in general are also mentioned in the October Notice. First, NHTSA suggested that the public might regard automatic restraint requirements as "an expensive example of ineffective regulation," which might generate a public backlash against all mandatory safety measures. However, as the court pointed out, all the evidence indicated that passive restraints would be effective rather than ineffective. 680 F.2d at 236, 241.

NHTSA also suggested that a passive restraint requirement was "inequitable" because those who currently use their manual belts would have to pay for a system which affords them no additional protection. In fact, "even current users of manual belts" would benefit from such a requirement because "lower insurance premiums [for everyone] could follow implementation of the rule." *See* 680 F.2d at 240 n.43.

Finally, NHTSA signalled its intent to induce increased manual belt usage through a "public education" campaign. However, as NHTSA Administrator Peck himself pointed out, that was not viewed as a substitute for a passive restraint rule, NHTSA Hearing at 277 (JA 1247A), since if the program worked it could increase the already substantially higher usage rates for passive restraints as well. Unfortunately, there is absolutely no evidence that such public education efforts have ever succeeded in raising belt usage. Comments of the Insurance Institute for Highway Safety at A-1 (May 26, 1981) (JA 454).

B. It Was an Abuse of Disrcetion To Rescind Even a Standard Which Permitted the New Design

The foregoing analysis assumed that NHTSA was correct in concluding that a standard which permitted compliance by a detachable belt (if in fact Standard 208 did so, *see supra* note 6) would not effectively increase belt usage rates. However, as the court below found, there was "not one iota of evidence" supporting the conclusion that such a standard would be ineffective; in fact, all of the record evidence supported the opposite conclusion.

First, the record before the agency clearly established that, until the agency set in motion the revocation process, several manufacturers had already installed or were planning to install ahead of schedule automatic restraints of proven effectiveness: *i.e.*, GM, Toyota and VW (use-inducing automatic belts as described *supra*); Ford and Mercedes-Benz (air bags); and Saab and Nissan (automatic belts). *See* NHTSA Progress Report No. 3 at 56-57 (July 1980) (JA 1634-35). By reopening the passive restraint rulemaking on the eve of its scheduled implementation, the agency virtually invited the industry to backtrack. Even so, only two manufacturers explicitly stated an intention to use detachable belts. 680 F.2d at 215 & n.11. There is every reason to believe, therefore, that even if a standard permitting detachables were implemented, most manufacturers would respond by installing systems that even NHTSA agrees are effective—they would certainly have every incentive *not* to purposely implement ineffective designs.

Moreover, the record evidence indicates that even if the manufacturers did comply with detachable belts, usage rates would still increase significantly. First, *every* kind of automatic belt tested to date has achieved that result. *See supra* p. 5. Second, detachable belts share with those belts the feature which NHTSA's most recent study indicates is the key to enhancing use. According to the 1981 National Safety Belt Study, the two most important reasons why people do not wear manual seatbelts are:

(1) the belts take "too much time" to put on, and (2) occupants are "too lazy" or forgetful to buckle up. *Id.* at 7 (JA 1108). Like other automatic belts, detachables eliminate these problems, because they do not require the user to take affirmative action to have the benefit of crash protection. As long as they remain connected, detachable belts take no time or thought to put on (they automatically envelop the occupant). In fact, they require an affirmative act to disconnect and therefore, like other automatic belts, put "inertia" on the side of protection rather than against it. 680 F.2d at 231 n.28. Hence, there is every reason to believe, as Professor Nordhaus concluded, that even detachable belts would generate substantial belt usage. Nordhaus Comment at 7-9 (May 1981) (JA 517-19).

It was in the context of this record support for detachables that the Court of Appeals proceeded to search in vain for any evidence, either in the "form of statistical data or logical argument," which questioned the effectiveness of those belts. Finding "not one iota" of such evidence, the court rightly concluded that NHTSA had abused its discretion. 680 F.2d at 231.

III. THE COURT OF APPEALS PROPERLY VACATED AND REMANDED THE RESCISSION, STAYING THE EFFECT OF THE UNDERLYING RULE FOR THE BENEFIT OF THE PETITIONERS HEREIN

The petitioners' final argument is that after finding the agency's action unlawful, the court below disposed of the case in a manner inconsistent with this Court's decision in *Vermont Yankee*. In that case, the Court held that when an agency's action "is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded to [the agency]"—but the court should not otherwise intrude into the administrative process. 435 U.S. at 549. The fact is that the court below followed *Vermont Yankee*'s instructions to the letter.

The Court of Appeals' June 1982 order disposing of the case says no more than that the agency's decision "is vacated, and the cases are remanded to [NHTSA] for further proceedings consistent with the opinion . . . ." Pet. App. 161a. Moreover, as the court's opinion recognized, this disposition did not preclude NHTSA from making "a reasoned decision" that the passive restraint standard should be suspended or rescinded. 680 F.2d at 241, 242. Indeed, the court explicitly offered the agency another opportunity to "find" "nonarbitrary reasons for rescinding the standard." 680 F.2d at 242. NHTSA responded by proposing fact gathering "which would take one or more years to complete." Pet. App. 133a.

Faced with that show of obstinancy, the court announced that it would stick to the letter of *Vermont Yankee*, and do no more than vacate and remand the case—although it reiterated that the agency was still "free to issue orders rescinding or modifying the passive restraint standard, subject to judicial review." Pet. App. 82a (August 4, 1982). As the court noted, however, vacating NHTSA's decision to rescind its prior rule had the effect of returning the matter to the *status quo ante litem*: *i.e.*, the unrescinded prior rule remained in effect. Pet. App. 81a. That conclusion as to the effect of vacating an agency's attempted revocation of a rule is precisely the same one recently reached both by the Third Circuit in *NRDC* v. *EPA*, No. 81-2068 at ¶¶ 47, 49, and by Judge Wilkey in *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 479 (D.C. Cir. 1982).

But the prior rule would have required installation of passive belts by September 1, 1982, a deadline which, since it was now August of the same year, the court knew the automakers could not meet. Hence, *for what was clearly the benefit of the very parties petitioning before this Court*, the court below simply stayed the passive restraint rule for yet another year, once again telling the agency it was free at any time to take action aimed

at delaying the deadline even further, or at overturning it altogether. Pet. App. 81a-82a. It even gave NHTSA an opportunity to advise as to whether the court should issue a further stay because one year was insufficient. Pet. App. 81a.[10]

It cannot be doubted that the Court of Appeals, in the exercise of its equity powers, had the authority to issue that temporary stay. *See Atchison, Topeka & Santa Fe Ry Co.*, 412 U.S. at 819; *cf. Mobile Oil Corp.* v. *FPC*, 417 U.S. at 311. Indeed, as the MVMA points out, such a stay of the same safety standard was issued by the Sixth Circuit in the *Chrysler* case. MVMA Pet. 27 n.54; *see Chrysler Corp.*, 472 F.2d at 681. And Judge Wilkey recently issued just such a stay after holding FERC's attempted revocation of a rule invalid in *Consumer Energy Council*, 673 F.2d at 479. To be sure, the Secretary of DOT has the power under 15 U.S.C. § 1392(e) to delay the effective date of a safety standard, *see* U.S. Pet. at 27, but there is nothing in the Safety Act suggesting that this provision was intended to deprive the courts of their historic equity powers. *See* 28 U.S.C. § 1651 (All Writs Act). It is the height of presumptuousness for those who benefitted from the court's plainly appropriate action to now attempt to use it as a ground for seeking certiorari.

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[10] On October 1, 1982, NHTSA told the court that the automakers could not install passive restraints until Model Year 1986 "at the earliest"—despite the fact that until Administrator Peck issued his first order in April of 1981, the manufacturers had been facing a compliance deadline of *September 1981*. The matter is presently pending in the Court of Appeals.

CONCLUSION

The petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

Of Counsel:
DONALD P. MCHUGH
Vice President and
General Counsel
State Farm Mutual
Automobile Insurance Co.

* *Counsel of Record*

JAMES F. FITZPATRICK *
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724
Attorneys for Respondents
State Farm Mutual Automobile
Insurance Company, et al.

October 8, 1982

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Nos. 82-354, 82-35[illegible] and 82-398

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.* and CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION and UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.* and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
RICHARD M. HALL
ZUCKERT, SCOUTT, RASENBERGER & DELANEY
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Counsel for Respondents
National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung

**Counsel of Record*

Of Counsel:
LOWELL R. BECK, President and
PAUL C. BLUME, Vice President & General Counsel
National Association of Independent Insurers

DONALD L. SCHAFFER, Senior Vice President, Secretary & General Counsel
Allstate Insurance Companies

October 8, 1982

QUESTION PRESENTED

Whether in light of all the facts and circumstances it was arbitrary and capricious and contrary to law for the National Highway Traffic Safety Administration to decide that a particular type of passive seatbelt proposed to be used by certain manufacturers would be too ineffective to warrant its use and that accordingly the entire passive retraint safety standard, covering air bags and other types of seatbelts of proven effectiveness, should be rescinded?

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Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.* and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

Respondents, National Association of Independent Insurers, Automobile Owners Action Council and Eugene J. Meyung (collectively referred to as "NAII"),[1] respectfully request that the petitions for a writ of certiorari be denied.

[1] NAII is a trade association of independent casualty insurers that together write approximately forty percent of all automobile casualty insurance in the United States. The members of NAII are identified in the

(footnote continues)

STATEMENT

The long history of this matter is well summarized in the court of appeals opinion. NAII would respectfully direct the Court's attention to the following points:

—The National Highway Traffic Safety Administration ("NHTSA") concluded that: (1) the type of passive seatbelts which certain manufacturers said they would install would be ineffective because once detached they would be equivalent to manual seatbelts; and (2) because those manufacturers said they would design and install such belts, all passive restraint requirements, including restraints of proven effectiveness, should be abandoned. In other words, NHTSA allowed the industry being regulated to select a system of "compliance" which that industry alleged would not achieve the statutory goals of saving lives and preventing injuries; it then totally excused the industry from compliance despite the existence of other systems that clearly would meet such goals.

—The court of appeals concluded that: (1) NHTSA's finding that the proposed belts would not increase usage significantly (a) was supported by *no evidence whatsoever*, (b) was contrary to evidence that showed major increases in usage whenever automatic belts have been installed, and (c) was contrary to other evidence which showed that the primary reason most people fail to use manual seatbelts is not because they are hostile to belts but because of laziness, forgetfulness or inconvenience, all of which would be obviated by the proposed belts; and (2) before abandoning the entire passive restraint standard on the basis of belts it found to be ineffective, NHTSA had an obligation under the Safety Act[2] at least to consider alternatives less drastic in terms of their safety consequences.

(footnote continued)

appendix to this brief. The Automobile Owners Action Council is a non-profit corporation dedicated to furthering the interests of automobile owners and drivers in safety.

[2] The National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. 1381 *et. seq.* (the "Safety Act").

—The Safety Act places an affirmative duty on NHTSA to avoid deaths and injuries to vehicle occupants arising from second collisions, *i.e.*, "to assure that when the car stops dead, the passengers don't." The Act makes safety "the overriding consideration in the issuance of standards" and calls upon the agency to force the development of new technology where necessary to do so. *See, Chrysler Corporation v. Department of Transportation,* 472 F.2d 659, 671-73 (6th Cir. 1972); *Pacific Legal Foundation v. Department of Transportation,* 593 F.2d 1338, 1340, 1344 (D.C. Cir.), *cert. denied* 444 U.S. 830 (1979). While economic considerations may be relevant to the question of whether a particular standard is "practicable," the perceived economic hardship of automobile manufacturers is not a relevant consideration except for very small companies which may be exempted on such grounds. *See* 15 U.S.C. 1410(d)(1). In any event, considering the relatively low cost of passive restraints, compliance with the passive restraint requirements was not a major economic obstacle facing the automobile manufacturing industry.

—The passive restraint standard is by far the most important safety standard promulgated by NHTSA for the protection of vehicle occupants.[3] This year approximately 25,000 vehicle front seat occupants will die and another 3 million will be injured in accidents. Only 10-11 percent of vehicle occupants will be protected by seatbelts. Each one percentage point increase in seatbelt usage will save 172 lives and prevent over 2,000 serious injuries. As the shift to smaller cars continues, the risk of death or injury increases, and even NHTSA acknowledges that absent passive restraints, the growing number of small cars will cause an additional 7,000 deaths annually by 1990. (Pet. App. 14a).

[3] Of the fifty motor vehicle safety standards promulgated by NHTSA, 49 C.F.R. § 571, the only one that directly addresses the second collision problem is Standard 208, *i.e.*, other standards in the 200 series (such as padded dash requirements) at most are intended to mitigate the effects of, rather than to prevent, the second collision.

—Passive seatbelts would add approximately $74 to the selling price of a new car, plus $15 of added fuel costs over the life of the car. (Pet. App. 16a). Insurance savings alone would offset some or all of this cost.[4]

—Congress has repeatedly refused to terminate the passive restraint standard despite claims of economic hardship by the auto industry. But NHTSA's rescission order appears to have had its origins on exactly those grounds. As the court of appeals observed after reviewing the record: "it is difficult to avoid the conclusion that NHTSA's analysis in Notice 25 has been distorted by solicitude for the economically depressed automobile industry—which is not the agency's mandate—at the expense of consideration of traffic safety, which is" (Pet. App. 70a (footnotes omitted)).[5]

—With the rescission of the passive restraint requirements in Standard 208, manufacturers are free to comply with that standard solely through the use of the manual belt systems first required in 1967 and found to be largely ineffective as early as 1969. (Pet. App. 6a).[6] Moreover, all of the affidavits submitted by the manufacturers to the court of appeals indicated that absent a requirement for

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[4] Auto sales normally amount to approximately ten million cars per year. At $89 per car, passive belts would therefore cost $890 million. Insurance savings are estimated by NHTSA at $4.3 billion if usage rates increased to 60 percent. (Pet. App. 15a).

[5] The court noted that the reasons initially given by the Secretary of Transportation for promulgating new rulemaking on passive restraints, one month after taking office, were related to economic conditions in the auto industry; and that NHTSA's action two months later delaying the effectiveness of Standard 208 and starting a rulemaking to consider rescission was announced by the White House as part of a package of economic recovery measures. (Pet. App. 13a, 71a). When the rescission order was finally adopted, NHTSA Administrator Peck acknowledged that it was contrary to the views of all of his staff. (Pet. App. 71a, n. 44).

[6] Apart from the low usage rate associated with manual belts, such belts do not have to meet the crashworthiness requirements of Standard 208. In other words, in rescinding the performance standards for passive restraints, NHTSA rescinded the *only* crashworthiness standards that applied to seatbelts, manual or automatic.

passive restraints, they will not be voluntarily introduced in the United States (except to the extent that limited passive belt systems have been made available in the past).[7]

REASONS FOR DENYING THE PETITIONS

I. Summary.

Petitioners acknowledge that the basic question before the Court is whether NHTSA acted arbitrarily and capriciously or not in accordance with law; and that this, in turn, is a question of whether the agency engaged in reasoned decisionmaking and reached a result that is rational and not clearly erroneous. Petitioners' quarrel is not with this standard but with the application of it to the facts and circumstances of this case.

The court of appeals did no more than it was required to do. It looked carefully at the record and at the purposes of the Safety Act both as written and subsequently considered by NHTSA, itself, and by Congress. No single factor was viewed as decisive, but looking at the entire record and the history of the standard the court of appeals was unable to find that the agency had acted rationally and in accordance with law in abolishing the entire passive restraint safety standard for the reasons it gave. The opinion of the court of appeals was not one that might have changed with a slightly different weighing of the factors or with more than the substantial deference it gave the agency decision. The agency's decision was, as Judge Edwards put it in his concurring opinion, "nothing more than a determined effort to achieve a particular result without regard to the facts at hand." (Pet. App. 75a-76a).

If the Court grants the petitions, it will not be called upon to decide significant questions as to the standard or scope of judicial review when a regulation is rescinded. Its task will be

[7] At least one manufacturer, Mercedes, offers an airbag system (driver-side only) in Europe but not for export to the United States. In affidavits submitted to the court of appeals, most major manufacturers have sworn that their passive restraint programs were dismantled shortly after the rescission order was issued.

the same as that performed by the court of appeals, a searching inquiry into a voluminous record to determine whether this particular agency action was arbitrary and capricious and not in accordance with law. Additionally, public interest considerations suggest against further review. There is a continuing and active Congressional interest in passive restraints—and the Congress is the ultimate forum where the decision to follow or to abandon the goals of the Safety Act should be made.

II. No Important Question Of Federal Law Is Presented.

Most of the questions presented for review by petitioners are not genuine questions for determination by the Court. The court of appeals did not adopt any novel theories on the standard of judicial review. It decided *this* case on *its* facts. While it discussed at some length the scope of its review of agency action in the circumstances presented, its opinion broke no new ground. The standard of review it observed was "whether the agency has engaged in reasoned decisionmaking, making actual judgments concerning the significance of the evidence in the record and supporting its decision with 'reasoned analysis'." (Pet. App. 48a-49a). This is, essentially, the typical *Overton Park* formulation and is not challenged by petitioners. It is a deferential standard consistent with the Court's long-standing precedents in the area of informal rulemaking.[8]

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[8] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *see also, Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 662-63 (1980) (Burger, C.J., concurring); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978); *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285 (1974). *Cf. American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 522-523 (1981) (similar standard applied under statutory substantial evidence test). It is also consistent with the highly deferential standard of review applied in other cases by Judges Mikva and Edwards, the authors of the majority and concurring opinions below. See *WJG Telephone Company, Inc. v. Federal Communications Commission*, 675 F.2d 386, 388-89 (D.C. Cir. 1982) (upholding FCC action based on estimate as long as FCC did not "pluck a number out of thin air"); *Connecticut Light and Power Company v. Nuclear Regulatory Commission*, 673 F.2d 525, 535 (D.C. Cir. 1982)

(footnote continues)

The questions presented by petitioners are curiously silent about the voluminous record which the court of appeals analyzed and the critical importance of what was in that record —and *not* in it—to the court of appeals decision. Instead, petitioners for the most part seek to have the Court address the correctness of selected pieces of verbiage from the court of appeals opinion or other abstract propositions of law on which the court's decision did not hinge. NAII's analysis of each of petitioners' "questions presented" is as follows:

A. ***Whether there is a different standard of review for rescission than initial promulgation; and whether an agency may reasonably rescind a regulation where it finds that "changed circumstances" create "substantial uncertainty" that the regulation will be effective.*** (Department of Transportation Questions 1 and 2;[9] Motor Vehicle Manufacturers' Questions 2 and 3; Consumer Alert/Pacific Legal Foundation Question 1).

The court of appeals did not hold that, as a matter of law, there is a greater burden on an agency to support rescission of a regulation than to support a refusal to promulgate in the first instance. It did not hold that an agency may not change its mind based on changed circumstances. It *did* hold that the decision to rescind a regulation, like the decision to promulgate

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(footnote continued)

(upholding NRC action although court had "to search dusty attic corners of the record to bring to light an adequate rationale for the Commission's action."); *Washington Association for Television and Children v. Federal Communications Commission*, 665 F.2d 1264, 1273 (D.C. Cir. 1981) (upholding FCC action although it "has by no means served as an exemplar of proper agency procedure in this case"); *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807, 809, 816-17 (D.C. Cir. 1981) (narrow standard of review applied to agency refusal to institute rulemaking); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 655 F.2d 318, 331-32 (D.C. Cir. 1981) (substantial deference to EPA "expertise" as long as it gives "plausible reasons" for action).

[9] DOT Question 2 may also be intended to raise the more general question of whether, on the facts of this case, the court of appeals decided correctly. If so, that question is discussed in Part III below.

one must be rational in light of all relevant facts and circumstances.

In this case, as the court of appeals noted, NHTSA did not and could not rescind on the basis of a "clean slate." (Pet. App. 47a). A "clean slate," or something close to it, might well exist when an agency is dealing with the question of whether to issue a regulation. But the passive restraint standard had a dozen years of relevant history including both the repeated refusal of Congress to rescind the standard and the fact that it had survived judicial review (twice) and the legislative veto process (once). The technological feasibility and lifesaving potential of the standard had been proved in actual use during that time. Surely such history is relevant to the question of whether the agency's decision was arbitrary and capricious. The court of appeals gave appropriate weight to that unusually long and significant history, but in doing so it did not announce a new principal of judicial review.[10]

Petitioners cannot be asking the Court to hold that the repeated incantation of "uncertainty" by the agency is by itself sufficient to trigger total judicial deference. They must recognize that all predictions about future behavior involve a measure of uncertainty, and that an agency finding of uncertainty which serves as the basis for its decision, like any other key finding, must have a rational basis. The court of appeals held no more. It simply found that on the basis of the record, and allowing for the required judicial deference, it could discover no rational basis for a degree of uncertainty sufficient to support rescission. Bearing that in mind, and that the issue here is safety, not economic regulation, it is absurd to suggest, as the manufacturers do, that the court of appeals opinion has some-

[10] The manufacturers have mischaracterized the court of appeals opinion as "conceding" that the reasons given by NHTSA for rescission in 1981 "would have been upheld as a basis for not adopting the regulations in 1977." (Manufacturers' Petition, at 17). The court did not state that a non-rational claim of "uncertainty" can support a decision either to promulgate or rescind. Rather, the court noted, "[t]here must be *some* reason to support *any* reasoned decision" and "[t]here is not one iota of evidence to support NHTSA's conclusion." (Pet. App. 51a).

how fueled the fires of anti-deregulation litigation. (Manufacturers' Petition, at 18, n. 33 and 24-25, n. 49).[11]

B. ***Whether the court of appeals was in error in finding a "congressional mandate" in post-enactment legislative events.*** (Manufacturers' Question 1).

Petitioners contend that the court of appeals wrongfully relied on the post-1966 congressional action on passive restraints to divine a mandate that otherwise would not exist.

The court of appeals did not base its opinion on any such mandate. It *did* examine the extensive history of passive restraints to determine whether or not NHTSA's *own* interpretation of its mandate as requiring a passive restraint standard had been acquiesced in by Congress. In so doing, it recognized that "a consistent administrative interpretation, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." (Pet. App. 47a, citing *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965)). As the Court has recently noted, the deference owed to an agency's construction of a statute "is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any

[11] In actual fact, despite the publicity the opinion has received since its publication on June 1, 1982, we have found only five instances in which it has been cited by a federal court and not once has it in any way been a controlling precedent. Rather, it has been collaterally cited for the hornbook propositions that when an agency reverses a prior position it must be careful to explain its reasoning, *National Resources Defense Council, Inc. v. Gorsuch*, No. 81-2208 (D.C. Cir. August 17, 1982), slip. op. at 19, n. 41, *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 683 F.2d 752, 760 (3rd Cir. 1982), *National Association for the Advancement of Colored People v. Federal Communications Commission*, 682 F.2d 993, 998 (D.C. Cir. 1982), and that an agency must act consistently with its enabling legislation, *Ashton v. Pierce*, 541 F.Supp. 635, 638 (D.D.C. 1982). Perhaps most instructive is *I.L.G.W.U. v. Donovan*, Civil Action No. 81-2606 (D.D.C. July 23, 1982), mimeo. op. at 8, in which the district court (Oberdorfer, J.) correctly distinguished *State Farm* on the facts and upheld the rescission of a regulation by the Department of Labor (in factual circumstances substantially different from those presented herein).

misperception." *See, United States v. Rutherford*, 442 U.S. 544, 553, 554 and n. 10 (1979), and cases cited therein.

The court's conclusion was that these legislative developments necessarily affected NHTSA's burden of explanation, but *did not bar rescission on the basis of changed circumstances or any other rational basis.* In concluding its discussion of this matter the court stated: "This does not mean that NHTSA may not revoke the standard. If the agency clearly articulates a reasonable basis for that action, we must defer to the policy judgment and expertise of the agency." (Pet. App. 48a).

C. ***Whether the court of appeals may invalidate a regulation because of the agency's failure to consider alternatives not raised by its notice of rulemaking or foreclosed by the agency action.*** (Manufacturers' Question 4).

This question is not raised by the court of appeals opinion. The court of appeals did not require the agency to adopt any particular procedure or to deny procedural due process to anyone. The court's opinion focused on the substantive obligation of the agency under the Safety Act to consider alternatives less drastic than total rescission. The agency failed to undertake such consideration. As a consequence it failed to explore its procedural options as well. The court of appeals did no more than insist on the consideration of those options.

In any event, the agency was not procedurally trapped as the question suggests. Its most obvious alternative presented no possible procedural bar. Having found that the GM-type belt would function like a manual rather than passive seatbelt, NHTSA could simply have announced that the belt did not meet the standard. This was the kind of thing NHTSA knew how to do and had done before.[12] It involved no amendment of the standard; it required no rulemaking.

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[12] NHTSA did precisely this on May 4, 1971, when several manufacturers inquired as to whether a manual seatbelt with an interlock would meet the passive restraint requirements. NHTSA stated that "[t]he concept of an occupant protection system that requires 'no action by vehicle occupants' as

(footnote continues)

D. ***Whether the court of appeals exceeded the proper limits of judicial review by ordering the passive restraint requirement into effect on September 1, 1983.*** (Department of Transportation Question 3; Manufacturers' Question 5).

This is not a substantial question, for several reasons. First, the court of appeals did not pull the September 1, 1983 compliance date out of thin air—*it is the date set by NHTSA* for small car compliance. The only date "set" by the court was the stay of large and mid-size car compliance, otherwise set by NHTSA for September 1, 1982, for one year, an equitable action taken solely for the benefit of the petitioners and in recognition of the practical consequences of the court's decision. *Cf., Northern Pipeline Construction Co. v. Marathon Pipe Line Company and United States,* 50 U.S.L.W. 4892, 4902 (June 28, 1982).

Second, the court of appeals mandate is tentative, pending review of NHTSA's October 1, 1982 submission concerning the efficacy of that compliance date. Finally, as the court's order made clear, NHTSA continues to be "free to issue orders rescinding or modifying the passive restraint standard, subject to judicial review." (Pet. App. 82a (footnote omitted)).

III. The Case Was Correctly Decided By The Court Of Appeals.

The court of appeals set aside NHTSA's action because: (a) NHTSA's finding that the proposed seatbelts would not increase usage enough to justify the cost was not rational; and (b) if such a finding was rational, NHTSA was required by the Safety Act to consider less drastic means of dealing with the problem.

a. In taking up the first question the court of appeals had to determine whether NHTSA's conclusion that it could not reliably predict "even a 5 percentage point increase" in passive

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(footnote continued)

used in Standard 208 is intended to designate a system that requires no action other than would be required if the protective system were not present in the vehicle." 36 Fed. Reg. 8296 (May 4, 1971).

restraint usage was rational. The Court examined the basis for that decision and found the following:

1. There had been no usage experience with the particular GM-type belt that the agency said most manufacturers would use,[13] and there was no other evidence of any kind on which the agency could base the conclusion it reached.

2. The GM-type belt was substantially similar to other passive belt systems in that it deployed automatically and had an emergency release mechanism. (Pet. App. 18a-19a, n.12). Like other belts, it could be detached only through use of that mechanism. It differed from other belts only to the extent that when detached, it was less obtrusive than some other designs.[14]

3. There was substantial evidence in the record on actual usage rates for other passive seatbelt systems. Some 350,000 Volkswagen Rabbits were equipped with passive belts between 1975 and 1980. Approximately 8,000 1978 and 1979 GM Chevettes had such belts, as did 13,000 1980 Chevettes. The record showed the following usage rates for passive versus manual belts for these cars. (Pet. App. 19a, n.12).

	Manual	Passive
VW Rabbit.....	34%	84%
1978-1979 Chevette.....	34%	71%
1980 Chevette	31%	70%

[13] It is by no means clear that most manufacturers would use such belts, and NAII believes the record will not support the agency's conclusion in this regard. The court of appeals, while conceding the finding could be erroneous, nevertheless deferred to it. (Pet. App. 50a).

[14] Once detached by the emergency release mechanism, the GM-type belt can be pushed aside but remains loose and obtrusive. The VW Rabbit passive belt is similar in this respect. The passive belt used in the 1980 Chevette could be released by the emergency mechanism but the shoulder portion could not be pushed aside, *i.e.*, it was "continuous" in the language of the court of appeals.

This evidence was dismissed by the agency as of no probative value. The court examined in detail the agency's reasons for totally rejecting the evidence and concluded, in an analysis of each reason that speaks for itself, that "NHTSA's reasons for refusing to extrapolate from the available data are extremely weak." (Pet. App. 52a, n.30).[15]

4. The record also contained substantial survey evidence showing that, while a "hard core" of the population will not wear seatbelts under any circumstances, the reasons most people do not use manual belts are obviated by passive belts. This evidence showed that such factors as "bothersome, inconvenient, forgot," (68% of respondents in one survey) and "too much time/hassle" and "not in habit/don't think about it /lazy" (47% of respondents in another survey) were the principal reasons manual seatbelts were not being worn. (Pet. App. 59a, n. 33).

5. This brief summary does not do justice to the court of appeals painstaking review of NHTSA's murky order and the voluminous record. (The joint appendix consumed 2,562 pages.) Such a review led Judge Edwards to make the following statement: "the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand.

[15] NHTSA's reasons for refusing to give any weight to the data were: (1) the cars equipped with passive belts were purchased intentionally by those seeking such belts; (2) those purchasers were not representative of the general public, educationally or otherwise; (3) some of the belt systems had ignition interlocks; and (4) all the cars were small and belt usage tends to be higher in smaller cars. However, as the court of appeals pointed out, these reasons were undercut by other facts and by NHTSA's own statements. For example, Chevette purchasers were not shown to be atypical, and the record indicated that most people who bought passive restraint-equipped cars were not looking for passive restraints; and that 55 percent of them did not even know they were getting them. The record also showed that the 1980 Chevette with no ignition interlock generated a greater increase in usage than cars with the interlock. As for size, it is true that manual belt usage tends to be higher on smaller cars but that fact does not address, let alone explain, why passive belt systems dramatically increased the usage rates in even the smallest cars. Moreover, small cars are rapidly becoming the norm rather than the exception. *Id.*

Plainly, this is not reasoned decisionmaking, and it cannot be sanctioned by this court." (Pet. App. 75a-76a). Given the same analysis we believe the Court would reach the same conclusion.

b. The court of appeals then turned to the question of whether the agency had a duty to consider alternatives less drastic than total rescission. Was it necessary to throw out "the baby with the bath water?" The court found that the agency had devoted not even "a modicum of reasoned analysis" to several obvious alternatives, the most apparent of which was to exclude seatbelts which do not function as passive restraints from the passive restraint standard. The court of appeals went on to identify other obvious alternatives, such as airbags,[16] which were not examined by the agency. The court of appeals did not mandate any alternative. It simply found that the Safety Act required *some* reasoned consideration of *some* alternative to total rescission.

Petitioners are critical of the court of appeals failure to accord adequate judicial deference to NHTSA. However, deference must first be accorded to the statute, especially one concerned with saving lives and avoiding injuries. Given the thrust of the Safety Act, any court would be concerned when an agency finds that a $74 increase in the purchase price of a car—an amount which could be more than offset by savings in insurance costs[17]—is too much to spend to save thousands of lives and to prevent tens of thousands of serious injuries.

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[16] Airbags are the "state of the art" passive restraint. NHTSA did not discuss airbags in its order because it found that the manufacturers did not intend to use them as a means of meeting the standard. (Pet. App. 96a). It did not even consider whether airbag use by manufacturers would increase if it declared that GM-type belts did not meet the standard. In addition, a few manufacturers, *e.g.*, Mercedes and BMW, indicated that they would rely on airbag systems to some extent to meet the passive restraint requirement (and only if there were such a requirement). It is the belief of NAII that in such case airbag results would be so compelling that the use of such systems by manufacturers would increase dramatically.

[17] NHTSA's own studies showed insurance savings of $4.3 billion annually, based on a 60 percent usage rate. (Pet. App. 15a).

NHTSA's Regulatory Impact Analysis indicated that an increase in seatbelt usage of thirteen percentage points (from 11% to 24%) would be needed to achieve the cost-benefit "break even" point. (Pet. App. 17a).[18] That represents 2,236 lives saved and over 26,000 serious injuries avoided in one year. And NHTSA itself acknowledged that, even with GM-type belts, a 10 percentage point increase was possible,[19] *i.e.*, 1,720 lives and 20,000 serious injuries. Such safety benefits are far more significant than were those at stake in *American Textile, supra.* The concern of the Court about giving effect to a safety statute in that case was not unlike the concern reflected by the court of appeals in this case.

IV. Further Review Would Not Be In The Public Interest.

Riding in an automobile is a high-risk environment. Far more Americans are exposed to that risk than work in textile mills or benzene plants. People are dying today and suffering needless serious injuries in substantial numbers because a passive restraint standard is not in effect. Those who want passive restraints in their cars, either for their own protection or to protect other members of their family, are not free to choose them. There is little choice of cars with passive belts (no American cars) and no cars are available with airbags.

It is no answer to say, as does Pacific Legal Foundation in its petition (p. 7), that people who care can purchase cars with automatic belts or "buckle the seatbelts they have now." And that is certainly not the answer Congress has given.

If the petitions are granted, it is certain that the petitioners will then seek a further stay, attempting to place the Court's busy calendar between automobile passengers and passive restraints. Even if that stay is eventually dissolved, and it most certainly would be, "the goals of the federal motor vehicle

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[18] It should be emphasized that neither NHTSA nor the court of appeals believed that a strict cost-benefit analysis was appropriate. (Pet. App. 17a, n. 10). *Cf., American Textile, supra.*

[19] "Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase *or nearer some higher value like a 5 to 10 percentage point increase.*" (Pet. App. 104a). (Emphasis added.)

safety program will have been dealt a serious setback." *Coleman, Secretary of Transportation v. PACCAR, Inc.*, 424 U.S. 1301, 1307-08 (1978) (Rehnquist, J., in chambers, vacating stay of motor vehicle standard entered by Ninth Circuit). It may seem premature to be arguing against a stay motion that has yet to be filed (although the petitions themselves appear to be arguing in support of such a motion), but given the history of this matter, and given the fact that any delay translates directly into deaths and serious injuries, it is caution bred by experience.[20]

At the same time, it is precisely the public interest implications of this matter, and the history of active Congressional interest, which give reason to believe that the decision to follow or to abandon the goals of the Safety Act will in due course be made in the forum where it should be made—the Congress.

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[20] This delaying process has already begun. Responding to the court of appeals on October 1, 1982, NHTSA stated its belief that the September 1, 1983 compliance date was not achievable. As to how it should proceed in the interim, NHTSA gave the following alternate courses: "[i]f the Supreme Court denies the Petition for a Writ of Certiorari filed by the Secretary, it will be time enough then for NHTSA to promptly conduct a rulemaking to consider new evidence from the manufacturers and other interested parties, and to provide a new effective date for Modified Standard 208;" or "[i]f the Petition for a Writ of Certiorari is granted there would be at that time compelling grounds for a stay of this Court's June 1st and August 4th orders." D.C. Cir. Nos. 81-2220 and 81-2721, NHTSA's Memorandum In Response To The Court's August 4, 1982 Order, at 10 (October 1, 1982). The one course that NHTSA steadfastly refuses to consider is the most obvious one: enforcement of the Safety Act's mandate by requiring passive restraints.

CONCLUSION

The opinion of the court of appeals is an opinion that likely would have been issued by any panel of any court of appeals in the nation. It did not make new law. It did not make bad law. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
RICHARD M. HALL
ZUCKERT, SCOUTT, RASENBERGER & DELANEY
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Counsel for Respondents
National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung

**Counsel of Record*

Of Counsel:
LOWELL R. BECK, President and
PAUL C. BLUME, Vice President & General Counsel
National Association of Independent Insurers

DONALD L. SCHAFFER, Senior Vice President, Secretary & General Counsel
Allstate Insurance Companies

October 8, 1982

The member companies of the National Association of Independent Insurers are the following:

Acceptance Insurance Company
Admiral Insurance Company
Agricultural Workers Mut. Auto. Ins. Co.
Agsecurity Insurance Company
Agway Insurance Company
Alabama Farm Bureau Mut. Cas. Ins. Co.
Alabama Farm Bur. Mut. Ins. Service, Inc.
Alexander Hamilton Ins. Co. of America
Allied Fidelity Insurance Company
Allstate Indemnity Company
Allstate Insurance Company
Alpha Property & Casualty Ins. Co.
American Agricultural Ins. Co.
American Bankers Ins. Co. of Florida
American Bonding Company
American Centennial Ins. Co.
American Colonial Insurance Company
American Colonial Insurance Co. Inc.
American Consumer Insurance Company
American Crusader Ins. Co., Ltd.
American Continental Insurance Company
American Excess Insurance Company
American Family Home Insurance Company
American Family Mutual Insurance Company
American Farmers Mutual Casualty Company
American Fidelity Fire Ins. Co.
American Fidelity Insurance Company
American Guarantee & Liability Ins. Co.
American Liberty Insurance Company
American Modern Home Insurance Company
American Mutual Reinsurance Company
American National Gen. Ins. Co.
American National Property & Casualty Co.
American Re-Insurance Company
American Risk Assurance Company
American Service Mutual Insurance Co.
American Southern Insurance Company
American Specialty Insurance Company
American Universal Insurance Company
American Western Home Insurance Company
American Zurich Insurance Company

Aneco Insurance Co. of America, Inc.

Angelina Casualty Company

Archdale Mutual Insurance Co.

Argonaut Insurance Group

Argonaut-Midwest Insurance Company

Argonaut-Northwest Insurance Company

Argonaut-Southwest Insurance Company

Arkwright-Boston Insurance Company

Armed Forces Co-Operative Insuring Assn.

Armed Forces Ins. Exchange

Aspen Indemnity Corporation

Associated International Ins. Co.

Atlanta Casualty Company

Audubon Indemnity Company

Audubon Insurance Company

Auto Club Casualty Insurance Company

Auto Club Group Insurance Company

Auto Club Insurance Assn.

Auto Club Insurance Assn.

Auto-Owners Insurance Company

Automobile Club Insurance Company

Automobile Club Inter-Insurance Exchange

AVEMCO Insurance Company

BLC Insurance Company

Badger Mutual Insurance Company

Badger State Mutual Casualty Company

Bakers Insurance Company

Bankers Multiple Line Insurance Company

Bankers Mutual Insurance Company of D.C.

Belk Stores Insurance Reciprocal

Bellefonte Reinsurance Company

Bellefonte Underwriters Insurance Co.

Beneficial American Ins. Co., Ltd.

Brotherhood Mutual Insurance Company

Buffalo Reinsurance Company

Cal-Farm Insurance Company

California Cas. & Fire Ins. Co.

California Casualty Gen. Ins. Co.

California Casualty Indemnity Exchange

California Casualty Insurance Company

Cameron Mutual Insurance Company

The Camis Corp.

Canadian Universal Ins. Co., Inc.

Canadian Universal Ins. Co., Ltd.

Capital Enterprise Ins. Co.

Capital Landmark Insurance Company

Capitol Fire & Marine Insurance Company

Carolina Casualty Insurance Company

Carriers Insurance Company

Casualty Indemnity Exchange

Casualty Insurance Company

Casualty Reciprocal Exchange

Catholic Relief Ins. Co. of America

Celina Mutual Insurance Company

Centaur Insurance Company

Center Mutual Insurance Company

Central Lloyds

Central National Insurance Co. of Omaha

Champion Insurance Company

Chicago Insurance Company

Chicago Mutual Liability Company

Chrysler Insurance Company

CIM Insurance Corporation

Civil Service Employees Insurance Co.

Classified Insurance Corporation

Colonial Assurance Company

Colonial Insurance Co. of California

Colorado Farm Bureau Mutual Ins. Co.

Columbus Insurance Company

COMCO Insurance Company

Commercial Standard Insurance Company

Compac Insurance Company

Compass Insurance Company

Concord General Mutual Insurance Co.

Consumers Insurance Company

Cornhusker Casualty Company

Continental Divide Insurance Company

Continental Western Insurance Company

Cotton States Mutual Insurance Company

Country Casualty Insurance Company

Country Mutual Insurance Company

Covington Mutual Insurance Company

Credit General Insurance Company

Criterion Insurance Company

Crusader Insurance Company

Cumis Insurance Society, Inc.

Dairyland Insurance Company

John Deere Insurance Company

Delta Lloyds Insurance Co.

Dependable Insurance Company, Inc.

Developers Insurance Company

Diamond Guaranty Insurance Company

Diversified Insurers Company

Dixie Insurance Company

Donegal Mutual Insurance Company

Dover Insurance Company Limited

Early American Insurance Company

Early Settlers Insurance Company

Economical Mutual Insurance Company

Elite Insurance Company, U.S. Division

Elkhorn Insurance Company

Emmco Insurance Company

Emmco Insurance Co. of Delaware

Emmco Lloyds Insurance Company

Empire Fire and Marine Insurance Company

Empire Indemnity Insurance Company

Employee Benefits Insurance Company

Employers Reinsurance Corporation

Ennia Gen. Ins. Co. (US Branch)

Ensign Insurance Company

Equity Mutual Insurance Company

Erie Insurance Company

Erie Insurance Exchange

Essex Insurance Company

Evanston Insurance Company

Evanston Reinsurance Company

Excalibur Insurance Company

Exchange Mutual Insurance Company

Family Insurance Corporation

Farm Bureau General Ins. Co. of Michigan

Farm Bureau Mutual Ins. Co. of Ark., Inc.

Farm Bureau Mutual Ins. Co. of Idaho

Farm Bureau Mutual Insurance Co.—Iowa

Farm Bureau Mutual Insurance Co., Inc.

Farm Bureau Mutual Ins. Co. of Michigan

Farm Bureau Insurance Co. of Nebraska

Farm Bureau Town & Country Ins. Co. of Mo.

Farm Family Mutual Ins. Co.

Farmers and Merchants Insurance Company

Farmers Automobile Ins. Association

Farmers Mutual Hail Ins. Co. of Iowa

Farmers Mutual Ins. Co. of Nebraska

Farmers Reliance Insurance Co. of N.J.

Farmland Mutual Insurance Company

FB Insurance Company

Federal Kemper Insurance Company

Federated Guaranty Mutual Insurance Co.

Federated Rural Electric Ins. Corp.

Fidelity-Southern Insurance Company

Financial Indemnity Company
Fire Insurance Co. of Quaker City
First American Insurance Company
First of Georgia Insurance Company
First of Georgia Underwriters Company
First Security Insurance Company
Florida Farm Bureau Cas. Ins. Co.
Florida Farm Bureau Mutual Ins. Co.
Folksamerica Reinsurance Company
Foremost Insurance Company
Forum Insurance Company
Foundation Reserve Ins. Co., Inc.
Frankona Reinsurance Co. (U.S. Branch)
Gamut Indemnity Company
General Agents Ins. Co. of Amer., Inc.
General Casualty Company of Illinois
General Casualty Co. of Wisonsin
General Reinsurance Corporation
Georgia Farm Bureau Mutual Ins. Co.
Georgia Insurance Company
Germantown Mutual Insurance Co.
Gerling Global Reinsurance Corporation
Globe American Casualty Company
Goodville Mutual Casualty Company
Government Employees Insurance Company
Grange Insurance Association
Grange Mutual Casualty Company
Gray Insurance Company, The
Great Falls Insurance Company
Great Global Assurance Co.
Great Southwest Fire Insurance Company
Great West Casualty Company
Green Mountain Insurance Co., Inc.
Grinnell Mutual Reinsurance Co.
Guarantee Insurance Company
Guaranty Insurance Company
Guaranty National Insurance Company
Hallmark Insurance Company, Inc.
Hamilton Insurance Company
Harbor Insurance Company
Harco National Insurance Company
Harleysville Mutual Insurance Company
Heart of America Fire & Casualty Undrts.
Herald Fire Insurance Company

Heritage Mutual Insurance Company

Home Mutual Insurance Company

Home-Owners Mutual Insurance Company

Hoosier Insurance Company

Houston General Insurance Company

Huron Insurance Company

Ideal Mutual Insurance Company

IGF Insurance Company

Illinois Founders Insurance Company

Implement Dealers Mutual Insurance Co.

IMT Insurance Company

Independent Indemnity Company

Independent Fire Insurance Co.

Inland Insurance Company

Inland Mutual Insurance Company

Insurance Company of Evanston

Insurance Company of Florida

Integrity Mutual Insurance Company

Integon General Insurance Corporation

Integon Indemnity Corporation

Inter-Insurance Exch Chgo Motor Club

International Fidelity Insurance Co.

The International Insurance Co.

Interstate Fire and Casualty Company

Interstate Indemnity Company

Iowa American Ins. Co.

Iowa Mutual Insurance Company

Island Insurance Company Ltd

Kansas Fire and Casualty Company

Kentucky Central Insurance Company

Kentucky National Insurance Company

Kentucky Farm Bureau Mutual Ins. Co.

Kentucky Insurance Company

Keystone Insurance Company

KFB Insurance Company, Inc.

Kingsley International Ins., Ltd.

Lake States Mutual Insurance Company

Lakeland Fire & Casualty Co.

Landmark American Ins. Co.

Le Mars Mutual Insurance Co. of Iowa

Liberty National Fire Insurance Co.

Lincoln General Insurance Company

Lincoln Insurance Company

Lincoln Mutual Casualty Company

Lincoln National Reinsurance Co.

Lloyds of New Mexico Insurance Company

Lloyds, New York

London & American Insurance Company

Louisiana Farm Bur. Cas. Ins. Co.

Louisiana Farm Bureau Mutual Ins. Co.

Lutheran Benevolent Insurance Exchange

Madison Mutual Insurance Company

Mead Reinsurance Corporation

Members Insurance Company —Texas

Members Mutual Insurance Company

Members Service Insurance Company

Memphis Fire Insurance Company

Mercantile & Gen Reins Co of America

Merchants Bonding Company —Mutual

Meridian Mutual Insurance Company

Meridian Standard Insurance Company

Merit Insurance Company

MGIC Indemnity Corporation

Michigan Educational Employees Mut. Ins.

MIC General Insurance Corporation

MIC Property & Casualty Ins. Corp.

Mid-America Preferred Ins. Co.

Mid-Continent Casualty Company

Mid-Continent Insurance Company

Midland Insurance Company

Midland Prop. & Cas. Ins. Co.

Midwest Mutual Insurance Company

Midwestern Indemnity Company

Midwestern National Ins. Corp.

Milwaukee Guardian Insurance Inc.

Milwaukee Mutual Insurance Company

Milwaukee Safeguard Ins. Co.

Minnehoma Insurance Company

Mississippi Farm Bur. Mut. Ins. Co.

Montgomery Ward Insurance Company

Money Reinsurance Corp

Morrison Assurance Co., Inc.

Mortgage Guaranty Insurance Corp.

Motor Club of America Insurance Company

Motor Club Insurance Association

Motor Club of Iowa Insurance Company

Motorists Mutual Insurance Company

Motors Insurance Corporation

Mt. Vernon Fire Insurance Co.

Mountain West Farm Bureau Mutual Ins. Co.

Munich American Reinsurance Co.

Mutual Benefit Insurance Company

National American Ins. Co. of New York

Nassau Insurance Company

National Chiropractic Mutual Ins. Co.

National Excess Insurance Company

National Farmers Union Prop. & Cas. Co.

National Farmers Union Standard Ins. Co.

National Fire & Marine Insurance Company

National General Insurance Company—Miss.

National General Insurance Company—Mo.

National Idemnity Company

National Insurance Underwriters

National Investors Fire & Cas. Ins. Co.

National Mutual Insurance Company

National Property Owners Insurance Co.

National Reinsurance Corporation

National Trust Fire Insurance Company

Nationwide General Insurance Company

Nationwide Mutual Fire Insurance Company

Nationwide Mutual Insurance Company

Nationwide Property & Casualty Ins. Co.

New South Insurance Company

Nodak Mutual Insurance Company

North American Co. for Prop. & Cas. Ins.

North American Reinsurance Corp.

North American Lloyds of Texas

Northbrook Excess & Surplus Ins. Co.

Northbrook Indemnity Company

Northbrook Natl. Ins. Co.

Northbrook Property & Cas. Ins. Co.

North Carolina Farm Bur. Mut. Ins. Co.

North East Insurance Company

Northfield Insurance Company

North Pacific Insurance Company

Northland Insurance Company

Northland Casualty Company

Northwest Farm Bureau Insurance Company

North-West Insurance Company

NWNL General Insurance Company

NWNL Reinsurance Company

Occidental Fire and Casualty Co. of N.C.

Ohio Farmers Insurance Company

Ohio Hardware Mutual Insurance Company

Ohio Reinsurance Corp.

Oklahoma Farm Bur. Mut. Ins. Co.

The Oklahoma Surety Company

Old Dominion Insurance Co.

Old General Insurance Company

Omaha Indemnity Company

Omega Insurance Company

Oregon Automobile Insurance Company

Oregon Mutual Insurance Company

Ormond Reinsurance Company

Owners Insurance Company

Pacific Insurance Company

Pacific Marine Insurance Company

Paxton National Insurance Company

Pekin Insurance Company

Peninsula Insurance Company

Peninsular Fire Insurance Company

JC Penney Cas. Ins. Co.

Personal Service Insurance Company

Petroleum Casualty Company

Pine Top Insurance Company

Prairie States Fire Insurance Company

Preferred Risk Mutual Insurance Company

Presidio Insurance Company

Professional Mutual Insurance Company

Professional Underwriters Insurance Co.

Progressive Casualty Insurance Company

Property Owners Insurance Company

Protective Casualty Insurance Company

Protective Fire & Casualty Company

Protective Insurance Company

Protective National Insurance Company

Providers Insurance Company

Prudential Assurance Company, Ltd.

Puritan Insurance Company

Ranger Insurance Company

Ranger Lloyds

Reciprocal Exchange

Redwood Fire & Casualty Insurance Co.

Regent Insurance Company

Republic Mutual Insurance Company

Regis Insurance Company

Reinsurance Company of America, Inc.

Reliable Insurance Company

Resolute Reinsurance Company

Rhineland Rein. Corp. of America, Inc.

Rider Insurance Company

RLI Insurance Company

Rochdale Insurance Company

Rockford Mutual Insurance Company

Rocky Mountain Fire & Casualty Company

Rural Mutual Insurance Company

Safety Insurance Company

Save-T-Risk Insurance Company

Scor Reinsurance Company

Secured Insurance Corporation

Select Risk Mutual Fire Ins. Co.

Sheffield Insurance Company

Shelter General Insurance Company

Shelter Mutual Insurance Company

Shield Insurance Company

Simcoe & Erie General Insurance Co.

Signet Reinsurance Company

Skandia America Reinsurance Corp.

South Carolina Farm Bur. Mut. Ins. Co.

South Dakota Farm Bureau Mutual Ins. Co.

Southeast Title & Insurance Company

Southern Farm Bureau Casualty Ins. Co.

Southern Casualty Insurance Company

Southern Guaranty Insurance Company

Southern Home Insurance Company

Southern States Insurance Exchange

Southern Trust Insurance Company

Southwestern Insurance Company

Southwestern National Insurance Company

Standard Fire Insurance Co. of Alabama

Standard Guaranty Insurance Company

Standard Mutual Insurance Company

State Automobile & Casualty Underwriters

State Automobile Insurance Association

State Automobile Mutual Insurance Co.

State Mutual Insurance Company

State Security Ins. Co.

Statesman Insurance Company

Stonewall Casualty Company

Stonewall Insurance Company

Summit Fidelity and Surety Company

Surplus Underwriters Casualty Ins. Co.

Sutter Insurance Company

Tennessee Farmers Mutual Insurance Co.

Texas Farm Bureau Mutual Ins. Co.

Texas Farm Bureau Underwriters

Texas United Insurance Co.

Thomas Jefferson Insurance Company

Thurston Fire and Casualty Ins. Co.

Tico Insurance Company

Tower Insurance Company, Inc.

Town & Country Fire & Cas. Ins. Co., Inc.

Town & Country Insurance Company

Traders & General Insurance Company

Tradewind Insurance Company Ltd.

Transamerica Countrywide Ins. Co.

Transamerica Indemnity Company

Transamerica Ins. of Michigan

Transamerica Insurance Co. of New York

Transamerica Ins. Co. of Texas

Transamerica Ins. Corp. of America

Transatlantic Reinsurance Company

Transamerica Insurance Company

Transamerica Premier Insurance Company

Transit Casualty Company

Transport Indemnity Company

Transport Insurance Company

Twentieth Century Insurance Company

Union Indemnity Ins. Co. of New York

Union Insurance Company

Union Standard Insurance Company

Union International Ins. Co. Limited

United Community Ins. Co.

United Equitable Casualty Company

United Equitable Insurance Company

United Farm Bureau Mutual Insurance Co.

United Fire Insurance Company

United National Insurance Company

United Services Automobile Association

United States Liability Ins. Co.

Universal Casualty Ins. Co.

Universal Insurance Company

Universal Underwriters Insurance Company

Universal Underwriters Lloyds

Universal Underwriter of Texas

USAA General Indemnity Co.

Utah Farm Bureau Mutal Ins. Com.

Vermont Accident Ins. Co., Inc.

Verex Corporation

Vernon Fire and Casualty Insurance Co.

Viking Insurance Company of Wisconsin

Virginia Farm Bur. Mut. Ins. Co.

Virginia Mutual Insurance Company

Virginia Surety Company

Voyager Casualty Insurance Company

Wausau Underwriters Ins. Co.

Wawanesa Mutual Insurance Company

Wesco Insurance Company

West Bend Mutual Insurance Company

Western Community Ins. Co.

Western Carriers Insurance Exchange

Westfield Insurance Company

Westfield National Insurance Company

Western Agricultural Insurance Co.

Western Farm Bur. Mut. Ins. Co.

Western Lloyds Insurance Company

Western Preferred Casualty Company

Western World Insurance Co., Inc.

Westmoreland Casualty Company

Wilshire Insurance Company

Wisconsin Employers Insurance Group

Workmen's Auto Insurance Company

Worldwide Underwriters Insurance Company

Yosemite Insurance Company

Zale Indemnity Company

Zurich American Insurance Co. of Ill.

Zurich Insurance Company

Zurich Reinsurance Company of New York

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ALEXANDER L. STEVAS,
CLERK

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

October Term, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT and PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FOR RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General
of the State of New York
Attorney for Respondent Superintendent of Insurance of the State of New York
Two World Trade Center
New York, New York 10047
(212) 488-2464

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions
ROBERT S. HAMMER
Assistant Attorney General
Of Counsel

Question Presented

Whether the revocation by the National Highway Traffic Safety Administration of the "passive restraint" requirements of Federal Motor Vehicle Safety Standard 208 was arbitrary and capricious?

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

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CONSUMER ALERT and PACIFIC LEGAL FOUNDATION,

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

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UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FOR RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK

Respondent, Albert B. Lewis, Superintendent of Insurance of the State of New York, respectfully requests the Court to deny the petitions for writs of certiorari to review the opinion and judgment herein of the United States Court of Appeals for the District of Columbia Circuit.

Statement of the Case

In the interests of brevity, the Court is respectfully referred to the statement of the case contained in the briefs in opposition to certiorari submitted by the other respondents and in the opinion of the Court of Appeals (4-24a).*

Reasons for Denying the Writ

A.

This case fails to present any novel or important question of law. The Court of Appeals simply applied the Administrative Procedure Act test of whether the Department of Transportation's action rescinding Federal Motor Vehicle Safety Standard 208 was, upon the record, "arbitrary and capricious", 5 U.S.C. § 706(2)(A), *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Congress made this test applicable "to all orders establishing, amending or revoking a Federal motor vehicle safety standard," 15 U.S.C. § 1392(b). This is the standard utilized by the Court of Appeals (24-25a), and all parties agree that it is the proper standard, Motor Vehicles Mfrs. Ass'n pet. pp. 11-12; Consumer Alert pet. p. 14; DOT

* Numbers in parentheses followed by "a" refer to the appendix to the petition for certiorari filed by Motor Vehicle Manufacturers Ass'n.

pet. pp. 16-18; National Ass'n of Independent Insurers' br. in op., p. 6; State Farm br. in op., p. 9.

Although the petitioners allege that this test was applied in a distorted and improper manner, their claims are belied by the Court of Appeals' analysis (49a, *et seq.*). Petitioners are actually asking this Court to second guess the Court of Appeals' review of the factual record; an inappropriate invocation of this Court's jurisdiction, *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283, 310 (1974).

B.

The Superintendent of Insurance of the State of New York joins with the other respondents in opposing certiorari for the reasons stated in their briefs. In addition, as the official responsible for the regulation of the insurance industry in a major state, he urges the following considerations:

The introduction into automobiles of passive restraints, especially "air bags", as provided in Federal Motor Vehicle Safety Standard 208, will necessarily result in lower automobile insurance costs by reason of the substantial reduction in deaths and serious injuries from automobile accidents. As the Court of Appeals noted (65a, fn. 37), it is the Superintendent's intent to mandate, forthwith, rate reductions for cars equipped with passive restraints which comply with Standard 208. Reductions will be based upon appropriate actuarial predictions. Rate reductions for policies on vehicles presently equipped with passive restraints have already been approved in New York and other states.

The evidence in the record, much of it from government sources, is overwhelming that passive restraints are effective in preventing death and serious injury in automobile collisions; that if installed, they will be widely used (18-19a, fn. 12-14; 51-53a); that the cost of these devices would be moderate and eventually would save $4.3 billion dollars annually in insurance costs alone. The economic and human benefits from fewer automobile-related deaths and serious injuries would be incalculable (15a).

The practicability of Standard 208 is further demonstrated by the fact that passive restraints have already been installed by such major manufacturers as General Motors, Volkswagen and Toyota in some of their production models (18a, fn. 12).

Regrettably, both the automobile industry and the Department of Transportation have attempted through delays in the Court of Appeals, additional administrative proceedings (85a), and by the instant petitions for certiorari, to delay further the implementation of Standard 208. The Court of Appeals was extremely generous and restrained in giving the Department of Transportation every opportunity to justify the proposed rescission of Standard 208 (68-76a) and, as a matter of equity, gave the petitioners an additional year for compliance, see *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, —— U.S. ——, 102 S.Ct. 2858, 2880 (1982). One can only conclude that the Department of Transportation is attempting to ignore ten years' administrative history in a continuing effort to frustrate the will of Congress to "reduce traffic accidents and deaths and injuries resulting from traffic accidents", 15

U.S.C. § 1392(a), through the adoption of appropriate safety standards.

The clear arbitrariness of the Department of Transportation's position, as demonstrated by the opinion of the Court of Appeals (49a, *et seq.*), weighs heavily against further time-consuming judicial review.

Conclusion

The petitions for writs of certiorari should be denied.

Dated: New York, N. Y.
October 19, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General
of the State of New York
Attorney for Respondent
Superintendent of Insurance
of the State of New York

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions
ROBERT S. HAMMER
Assistant Attorney General
Of Counsel

Office - Supreme Court, U.
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CLERK

No. 82-354

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v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

* *Counsel of Record*

October 21, 1982

[Additional Counsel Listed on Inside Cover]

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice Presid[illegible]nd
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PENNA
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

The heart of the opposition to certiorari review in this case is the respondents' contention that the court below simply applied "the typical *Overton Park* formulation" for judicial review of agency action. NAII Opp. 6. *See also* State Farm Opp. 9; N.Y. Opp. 2. In fact, the court of appeals found the appropriate scope of judicial review to be "the most troublesome question in this case." App. 25a. The court stated this question to be apparently of "first impression" (*id.*), and deemed it worthy of a 25-page analysis. The court's unprecedented answer completely transformed the traditional scope of review of predictive agency judgments as to whether a prospective regulation would produce benefits justifying its implementation. The rule of law expounded by the court was not simply a "theoretica[l]" exercise (State Farm Opp.

8); it was vital to the court's decision. If left unreviewed, it will critically affect the agency's actions on remand in this case. It will also raise a substantial legal barrier against any deregulatory initiative by any regulatory agency.

1. Respondents' argument that the court of appeals applied the "traditional" arbitrary and capricious standard of review ignores what the court unequivocally held.[1] In the five-page portion of its opinion rejecting NHTSA's decision to rescind the passive restraint requirement (App. 50a-54a), the court focused exclusively on the third of three agency "findings"—that NHTSA " 'cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase.' "[2] The court's treatment of this finding cannot be written off as "selected pieces of verbiage" (NAII Opp. 7) or innocuous "phraseology" (State Farm Opp. 13-14). It formed the core of the court's disagreement with NHTSA concerning the appropriate course of action when an agency is uncertain about whether a prospective regulation will produce the desired benefits. As the court explained:

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[1] Respondents contradict their own "traditional" argument. NAII argues that congressional failure to rescind the prospective passive restraint provisions of Standard 208 was "[s]urely . . . relevant to the question of whether the agency's decision was arbitrary and capricious." In NAII's view, it was proper for the court below to "conclud[e] that these legislative developments necessarily affected NHTSA's burden of explanation." NAII Opp. 8, 10. Like the court of appeals, NAII provides no prior authority for this unprecedented notion that a court's own view of subsequent legislative actions that fall short of becoming law may be used to determine whether an agency decision—concededly within the discretion allowed by its governing statute—is "arbitrary" or "capricious."

[2] App. 50a. The first two agency findings cited by the court were that (1) most manufacturers planned to use *detachable* passive belts and (2) that once detached a detachable belt " 'becomes identical to a manual belt.' " *Id.* Much of respondents' efforts are directed at challenging these findings, even though the court upheld both findings as "reasonable." *Id.*

> "The rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up.
>
> "In taking this third step, NHTSA turned the question on its head and thus totally misdirected its analysis. *There may well be 'substantial uncertainty' about the seatbelt usage rates that can be predicted if detachable belts are widely used. But the question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not.* NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so. . . . To state this point in the reverse, it would be unreasonable for an agency to promulgate a regulation simply because of 'substantial uncertainty' that the status quo was any better." App. 51a (emphasis supplied).

The court thus placed on the agency the burden of disproving that the passive restraint requirement would produce the benefits previously predicted. The court deprived the agency of any discretion to rescind a prospective regulation when changed circumstances create "substantial uncertainty" as to whether earlier predictions of its benefits will actually be realized. The court, misstating what NHTSA actually found,[3] said:

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[3] In this and other portions of its opinion, the court inaccurately referred to NHTSA's position as a finding that passive restraints would in fact fail to increase seatbelt usage by 13 percentage points. *See* MVMA Pet. 10 n.17. As the court's holding quoted above makes clear, the agency never so found. Instead, it concluded:

> "Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase." App. 104a.

The court of appeals imposed a standard of review under which NHTSA's uncertainty about realizing the increase in usage rates that would be necessary to justify the standard was not a sufficient

> "There is not one iota of evidence to support NHTSA's conclusion that Modified Standard 208 as written will fail to increase nationwide seatbelt use by 13 percentage points or more. . . . If, as NHTSA contends, the passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, then *only a well justified refusal to seek more evidence could render rescission non-arbitrary. . . . The agency did not do so; it rested its decision only on 'substantial uncertainty' about these rates. Its decision to rescind the standard thus was arbitrary because the decision was supported by no record evidence whatsoever.*" App. 51a-54a (emphasis supplied).

The court thus held that a finding it mistakenly attributed to NHTSA was arbitrary because it was unsupported by "one iota of evidence." App. 51a. Respondents argue that this language provides a "wholly independent ground" for the court's decision—the existence of a factual flaw in the agency's findings. State Farm Opp. 13; *See* NAII Opp. 2.[4] However, the court's critical holding quoted above makes clear that the real dispute here was one of fundamental policy. The court accepted that "substantial uncertainty" as to the effectiveness of a prospective standard is sufficient to justify not issuing the regulation in the first instance (App. 51a), but found the same uncertainty insufficient to rescind a prospective reg-

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basis for withdrawing a requirement that imposed substantial regulatory burdens.

[4] NAII also suggests that the court below "simply found . . . no rational basis for a degree of uncertainty sufficient to support rescission." NAII Opp. 8. NAII cites to no such finding by the court of appeals, and there is none. In fact, the court held that *no* degree of uncertainty could have justified rescission. Although the court did characterize NHTSA's reasons for refusing to extrapolate from the available data on usage rates of passive belts as "extremely weak" (App. 52a n.30), it did not premise its decision on this ground. The court illustrated the kinds of evidence upon which it was insisting—affirmative evidence that detachable belts would *not* experience a significant growth in usage rates. App. 53a.

ulation once it is issued, even though circumstances have changed and the regulation has not yet taken effect.

This is not a dispute about failure of proof; it is a dispute about the principle that must be proven. The agency was faced with the necessity of predicting the future effectiveness of a prospective standard in the face of substantial changes in circumstances between 1977 and 1981. State Farm is quite correct when it states that the issue is not "whether regulation or deregulation is a more blessed state of being." State Farm Opp. 16. The issue is whether, when it becomes clear that the prospective effects of regulation are uncertain, the governing statute leaves the agency with discretion to rescind.

2. To the extent they do not distort the court's holding on this critical issue,[5] respondents would sidestep it, and seek to substitute their own rationale for ruling it arbitrary and capricious to rescind the passive restraint standard. *See* State Farm Opp. 16-24; NAII Opp. 11-15. This rationale rests on the erroneous contention that there really is no "substantial uncertainty" after all—even though the court of appeals conceded "[t]here may well be" such uncertainty. App. 51a. These petitions, of course, must be decided on the basis of the rule announced by the court below, and not on the basis of what the court might have held but did not. *Malat v. Riddell*, 383 U.S. 569, 572 (1966). But respondents' alternative arguments are so highly misleading that they must be corrected.

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[5] State Farm suggests that all the court of appeals required of NHTSA was a duty "to explain its departure from prior norms." State Farm Opp. 14-15. Of course, it was Secretary Adams' 1977 decision that was the departure from prior norms. *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979); *see* MVMA Pet. 5-6. But here NHTSA *did* explain why it was rescinding the Adams order: because that order was based upon presumptions about the nature of passive restraints that could no longer be viewed as valid, presumptions that went to the heart of the critical issue of usage rates. *See id.* at 6-9. The court demanded far more than a rational explanation by NHTSA, because it rejected an explanation in 1981 that it expressly admitted it would have upheld in 1977. *See* App. 51a.

(a) Respondents argue that experience with passive belts now in the vehicle population shows a high usage rate. State Farm Opp. 20. However, the "technology *already in use*" (*id.* at 8, 14, 20) (emphasis in original) in the absence of a mandatory passive restraint standard is vastly different from the technology that NHTSA found manufacturers were planning to use to comply with the standard or that they could have been required to use under the statute.[6] Approximately 96% of these "in use" systems are belts equipped with ignition interlocks.[7] Experience with systems including ignition interlocks "already on the road" (State Farm Opp. 19) is of little or no relevance to any passive restraint standard, since Congress has forbidden NHTSA to require interlocks. 15 U.S.C. § 1410b(b)(1) (reprinted at App. 167a). Primarily for this reason, NHTSA concluded that the data on usage of systems with interlocks—which the court of appeals described as "arguably the most coercive belt system imaginable" (App. 18a n.12)—did not resolve the "substantial uncertainty" about usage rates for the non-coercive detachable belt systems manufacturers planned to use. *See* App. 98a-99a, 102a, 104a.[8]

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[6] NAII mis-described the passive belt system that most manufacturers planned to use had the passive restraint requirement remained in effect. They referred to it as a "GM-type" belt that "[o]nce detached by the emergency release mechanism . . . can be pushed aside but remains loose and obtrusive." NAII Opp. 12 n.14. As the agency made clear, these designs had been replaced by "easily detachable" passive belts, some of which could be detached and permanently stowed "as readily as the current manual lap and shoulder belts." App. 98a. The court of appeals understood this critical difference, even if respondents do not. *See* note 2 *supra*.

[7] This 96% figure may be calculated from the record data cited by the court. App. 18a n.12.

[8] Two other types of passive belts—both with a coercive or use-compelling design—had been installed in vehicles before NHTSA's rescission order. One very costly type was confined to a Toyota line of vehicles, and there were no statistically valid data on usage rates for this system. J.A. 85 (final regulatory impact analysis). Some 1980 Chevettes had a similar "spool release" design, but be-

(b) Respondents' pretense that there is no uncertainty about future usage rates also underlies their insistence that the agency should have permitted the passive restraint requirement to take effect in order to save thousands of lives and prevent millions of serious injuries. NAII Opp. 3, 14-15; State Farm Opp. 5, 18. Petitioners join with respondents in deploring the tragic human loss that could be avoided if motorists simply buckled up the effective "active" belts now required and available in all passenger cars. But respondents' claims that these tragedies would be mitigated had the agency not rescinded the passive restraint portion of Standard 208 assume that a substantial future increase in restraint system usage would result—a conclusion that the agency found it could not make.

(c) Respondents further confuse the issue by trying to pin NHTSA's uncertainty about usage rates on a purported "threa[t]" by manufacturers "to meet the standard by using an entirely new, 'detachable' automatic belt." State Farm Opp. 18. There is nothing "new" about detachable passive belts; far from being an "eleventh hour industry" design (*id.* at 19), they were required by NHTSA for emergency egress purposes as long ago as 1974.[9] Indeed, in 1979 Administrator Claybrook recognized the conforming nature and important advantages of the noncoercive detachable belt:

> "There is a button that can release and disconnect it. That is important for exit purposes in emergency situations. As I understand, what is done is they release that button and disconnect the belt." [10]

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cause of public distaste for that system less than 13,000 of 415,000 Chevettes sold were purchased with this system (J.A. 403), despite a variety of special efforts by GM to promote their sale. J.A. 1448.

[9] *See* MVMA Pet. 4 n.7. After 1978, NHTSA did allow use of a spool release system as well as detachable systems. *Id.* As noted above, however, relatively few such systems have ever been sold because of their unpopularity with car buyers.

[10] *NHTSA—Authorization and Oversight: Hearings on H.R. 2585 Before the Subcomm. on Consumer Protection and Finance of the*

Neither the agency nor the court of appeals characterized the manufacturers' plans to continue to use detachable belts as a "threat." Those plans simply reflected the intense market competition in a situation in which consumers have a choice between one new car with a disliked feature (coercive passive belts) and another with a preferred feature (detachable passive belts).[11] The "substantial uncertainty" voiced by the agency and recognized by the court of appeals was based on nothing "new" at all.[12]

House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. 13 (1979). Claybrook said much the same thing a year later, describing the passive belt as one that "can be disconnected, you unhook it just the way you unhook anything else." Tr. of Broadcast of "Good Morning America," June 5, 1980 (prepared by Radio/TV Reports, Inc.).

[11] *See, e.g.*, J.A. 1429, 1433 (rulemaking comments of General Motors). In characterizing these plans to continue with detachable belts as a "threat," State Farm goes so far as to reargue that manufacturers might actually have switched over to nondetachable belt systems had NHTSA implemented the passive restraint requirements. State Farm Opp. 23. The court, however, upheld the agency's contrary finding. App. 50a.

[12] Like two members of the court of appeals, respondents suggest that NHTSA should have solved its uncertainty about usage rates by mandating nondetachability. NAII argues that NHTSA "could simply have announced that the [detachable] belt" long contemplated by Standard 208 and designed by the manufacturers "did not meet the standard." NAII Opp. 10. State Farm apparently recognizes the serious due process problems posed by such a cavalier approach, but argues that these problems no longer exist because NHTSA did not raise them. State Farm Opp. 19 n.7. This view is patently absurd: certainly the manufacturers' right to challenge an unlawful standard would not be circumscribed by any agency failure to recognize the illegality.

In any event, contrary to respondents' suggestions, the agency *did* consider the alternative of mandating nondetachable belts. It decided against doing so, both because of its established concern for ensuring emergency egress, and because of an apprehension by the public (rational or not) "that they could be trapped by the seat belt after a crash" (App. 110a)—concerns well documented by the administrative record. *E.g.*, J.A. 2364-79, 2485-92 (need for egress); 1651, 1665, 1679-80, 1703, 2260 (fear of entrapment).

3. Respondents assert that petitioners are "presumptuou[s]" in seeking review of the court's August 4 order setting a September 1983 effective date, because the court was doing petitioners a favor. State Farm Opp. 26. *See also* NAII Opp. 11; N.Y. Opp. 4.[13] This argument fails to deal with the unprecedented usurpation of the agency's primary jurisdiction inherent in the court's decision to set *any* effective date at all. *See* U.S. Pet. 27-28. That action should not go unreviewed by this Court.

CONCLUSION

For the reasons stated above and in their petition, petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

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[13] In fact, the court *sua sponte* ordered petitioners to meet an effective date that it had itself concluded on June 1 was impracticable. *See* App. 71a-72a. Far from being a stay of effective date with respect to small cars—an estimated 41% of new car fleets (App. 151a)—the court's order reimposed the original effective date for these cars, despite the fact that the standard had been rescinded from December 1981 to August 1982. *See* App. 86a.

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

October 21, 1982

MILTON D. ANDREWS
RICHARD A. PENNA
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.

Office - Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1982

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Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF PREVENTIVE MEDICINE AND AMERICAN PUBLIC HEALTH ASSOCIATION

DENNIS J. BARBOUR
Counsel for Amici
1015 - 15th Street, N.W.
Suite 403
Washington, D.C. 20005
(202) 789-2927

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF PREVENTIVE MEDICINE AND AMERICAN PUBLIC HEALTH ASSOCIATION

INTRODUCTION

The American College of Preventive Medicine and American Public Health Association submit this brief Amicus Curiae in opposition to Petitioners' Writ of Certiorari to the United States Court of Appeals for the District of Columbia in the belief that the granting of

the Writ will have a profound and irreversible effect by bringing about certain death and injury to a significant number of individuals through further delay in the implementation of certain auto safety measures. Specifically, Amici opposes a final order of the Department of Transportation (DOT) and its National Highway Traffic Safety Administration (NHTSA) which was issued on October 23, 1981 (46 Fed. Reg. 53419 (October 29, 1981)) and which rescinded the passive restraint provisions of Federal Motor Vehicle Safety Standard ("FMVSS") 208. The written consent of the parties to this action to file this brief are on file with the Clerk of the Court.

The American College of Preventive Medicine is a national medical society composed of over 2,000 individual physician members. One of the objectives of the organization is to "foster education and protection of the public regarding health promotion and disease prevention." The College has consistently and publicly stated its position of support for FMVSS 208 and the passive restraint provisions thereof.

The American Public Health Association is a non-profit professional society with a combined national and affiliate membership of over 50,000 health professionals throughout the United States. Founded in 1872, the APHA works to promote personal and environmental health by setting standards for alleviating health problems, launching public campaigns about specific health dangers, and publishing numerous materials reflecting the latest findings and developments in public health. For decades, the APHA has maintained an active interest in automobile safety. When the Administrator of the National Highway Traffic Safety Administration held hearings in August 1981 to consider the future of the passive restraint standard, the APHA presented testimony opposing the abandonment of passive restraints because of their potential for saving lives and preventing serious injury.

Amici represent the public as well as certain classes of individuals. They represent those who will be ultimately and perhaps most greatly affected by the judgment of the Court in this matter. The mandate of the Department of Transportation and its National Highway Traffic Safety Administration is to serve the public by promoting traffic safety. Members of the public who are physicians and health professionals such as the members of Amici are those who will experience first-hand the consequences of governmental action in the area of motor vehicle safety.

DISCUSSION

According to the latest available data (1977), motor vehicle accidents are the fifth leading cause of death in this country, and are the leading cause of death for persons in the age bracket of 1-24 years. In 1978, 51,500 persons died in motor vehicle accidents, of which approximately 28,000 were front seat occupants. An additional two million persons suffered disabling injuries in 1978 as a result of motor vehicle accidents.

This translates to the following morbid statistics: every 10 minutes someone dies in a traffic accident; injuries, many of which are the major cause of paraplegia, epilepsy[1] and cerebral palsy, are sustained at the rate of one every 8 seconds; the number of persons killed each day, 140, is the equivalent of a major airline crash.

The economic costs of motor vehicle accidents are equally staggering, from $24.3 billion to $29.3 billion per year in

[1] Head injury due to automobile accidents is the leading cause of epilepsy in adults. It is also one of the most preventable causes of epilepsy. The National Commission for the Control of Epilepsy and Its Consequences ("the Commission"), in its 1977 report to the President and Congress, estimated that motor vehicle accidents in the United States account for disabling injuries to more than 1.8 million persons per year, 540,000 of these being injuries to the head. The Commission found that approximately 20,000 of these cases develop epilepsy.

1981 dollars for all injuries and fatalities and from $15.8 billion to $18.9 billion in 1981 dollars per year for accidents involving front seat occupants.[2]

It was in response to this carnage and waste that the National Traffic and Motor Vehicle Safety Act was enacted in 1966. Among other things, the Act established the National Highway Traffic Safety Administration within the Department of Transportation and authorized the Secretary of Transportation to establish appropriate motor vehicle safety standards.

The motor vehicle standard which is the subject of this controversy, FMVSS 208, was promulgated in 1967 and originally required all automobiles manufactured and sold in the United States to be equipped with lap and shoulder belts. In 1977 the standard was amended to mandate passive restraint seat belt systems beginning with model year 1981 automobiles.

As the Court below correctly found, the government's basis for rescission of the passive restraint provisions of FMVSS 208, "[b]y any measure of reasoned decisionmaking . . . was arbitrary and capricious." State Farm et al. v. Department of Transportation et al., 680 F.2nd 206, 239 (D.C. Cir. June 1, 1982). Furthermore, in issuing its order as it did, the Court recognized the danger of simply remanding the petition to the agency, as threatening to allow "recalcitrance . . . (to) succeed where rational decisionmaking might not." 680 F.2nd 206, 241 (D.C. Cir. June 1, 1982). It is this concern which prompts Amici's opposition.

As it existed prior to the rescission order, FMVSS 208 represented years of research, analysis and litigation and was a reasoned balance of all interests at stake. Judi-

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[2] See *Comments of William Nordhaus on Notice of Proposed Rulemaking on Federal Motor Vehicle Safety Standards Occupant Crash Protection*, NHTSA Docket No. 74-14, Notice 22, May 26, 1981, Table A-2.

cial action has already meant delay in the implementation of this important rule for at least one year, and most likely for a greater period of time. Further consideration would only serve to impose greater delay, at enormous human and economic cost both to society and individuals who will be automobile accident victims.

The major justification for imposition of the passive restraint provisions was the low rate of usage of active systems, which was estimated at the time to be from 10 to 20 percent. In promulgating the passive restraint provisions in 1977, the DOT assumed that usage of seat belts would increase 50 percent as a result of the standard, to from 60 to 70 percent. Based on this estimation, DOT calculated that passive restraints would prevent 9,000 deaths and 65,000 injuries per year. Recent studies have calculated net economic benefits of the standard at $2.4 billion per year.[3]

This earlier approximation of lives saved and injuries averted has since been dramatically revised downward by the government to the point that in its October analysis (46 Fed. Reg. 53419 (October 29, 1981)) NHTSA implicitly discounted nearly totally the effect of the passive restraint provisions in stating:

> "The agency's analysis of the public comments and other available information leads it to conclude that it cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase." 46 Fed. Reg. 53419, at 53423 (October 29, 1981).

The Court of Appeals, in its decision, found that this sudden and dramatic re-estimation by the government was not based upon reasoned decisionmaking. Of equal

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[3] See *Comments of William Nordhaus on Notice of Proposed Rulemaking on Federal Motor Vehicle Safety Standards Occupant Crash Protection*, NHTSA Docket No. 74-14, Notice 22, May 26, 1981.

concern to Amici is the fact that estimates by others have been substantially greater. Among others, Professor Nordhaus has estimated that a one year delay would result in approximately 3,000 additional deaths and 60,000 injuries. Nordhaus Comments, *Id.* The central fact remains that, absent a passive restraint requirement, many individuals will die and many more will be maimed and injured. It is the dedication of the members of Amici to the prevention of such suffering which prompts their concern.

CONCLUSION

As the statistics demonstrate, while credible estimates of severity may vary, there is consensus that FMVSS 208 has substantial public health consequences and has very real meaning for the lives of those affected. Further delay in implementation of this rule, which has to date withstood considerable challenge, will therefore bring about consequences which will clearly be irreversible. For this reason, Amici respectfully submit that Petitioners' Writ of Certiorari should be denied.

DENNIS J. BARBOUR
Counsel for Amici
1015 - 15th Street, N.W.
Suite 403
Washington, D.C. 20005
(202) 789-2927

October 8, 1982

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and
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Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

PHILIP R. COLLINS*
1026 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 347-8899
**Counsel of Record*

October 8, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *ET AL.*,
Respondents.

MOTION OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, the Automotive Occupant Protection Association hereby moves for leave to file the attached brief *amicus curiae* in support of Respondents. In support of this motion, the Automotive Occupant Protection Association states:

1. The movant is a trade association representing manufacturers of passive automotive occupant protection systems or their component parts and assemblies. In its endeavor to pro-

mote the reduction of injuries and deaths from automobile accidents, it compiles and disseminates scientific data and reliable information about the value and capability of passive restraint systems, and proposes, studies and evaluates design and performance standards for passive motor vehicle occupant protection systems developed by its members, automobile manufacturers, independent testing groups, etc. It keeps abreast of the state of the art in passive automotive occupant protection systems.

2. Because of the interest of the Automotive Occupant Protection Association and its members in motor vehicle safety and the need of passive automotive occupant protection systems to insure motor vehicle safety, it participated in the proceedings before the National Highway Transportation Safety Administration, an agency of the Petitioner, the United States Department of Transportation, involving Federal Motor Vehicle Standard Number 208, Occupant Crash Protection (National Highway Transportation Safety Administration Docket Number 74-14, Notice Number 25), which was the subject of the Order, which was rescinded by the United States Court of Appeals for the District of Columbia Circuit in its Opinions and Orders respectively of June 1, 1982 and August 4, 1982 (Pet. App. 1a-82a). The agency Decision [issued October 23, 1981, 46 Fed. Reg. 53419; Pet. App. 88a-129a] directly and immediately affected this Association and its members manufacturing passive automotive occupant protection systems or their component parts and assemblies. The Association and its members, in support of the position of the Respondents herein (Petitioners in the Court of Appeals), urged rescission of the Order of the agency in the United States Court of Appeals for the District of Columbia Circuit as *amicus curiae* by leave of that appellate court, and in its brief furnished the Court, *inter alia*, with the benefit of the technical expertise of its members concerning the state of the art of air bags as a passive automotive occupant protection system.

3. The Association represents to the Court, pursuant to the provisions of Rule 36 of the Rules of this Court, that it has

followed the Court Rules in the preparation of this Motion and has attached hereto its brief as *amicus curiae* in opposition to the petitions for certiorari of the Petitioners herein.

For these reasons the Association requests the permission of the Court to file the attached brief which sets forth more fully its views in opposition to the petitions for certiorari.

Respectfully submitted,

Of Counsel:
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

PHILIP R. COLLINS
1026 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 347-8899
Counsel for Amicus Curiae Automotive Occupant Protection Association

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NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *ET AL.*,
Respondents.

BRIEF AMICUS CURIAE OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief is filed on behalf of the Automotive Occupant Protective Association contingent upon the Court's granting the Motion for Leave to File a Brief *Amicus Curiae* to which this brief is attached.

OPINIONS BELOW

The June 1, 1982 opinion of the Court of Appeals (Pet. App. 1a-78a)[1] is reported at 680 F.2d 207. The August 4, 1982 supplemental order and memorandum of the Court of Appeals (Pet. App. 79a-82a) are not reported. The decision of the Administrator of the National Highway Traffic Safety Administration rescinding the passive restraint requirements of Federal Motor Vehicle Safety Standard 208 (Pet. App. 88a-129a) is published at 46 Fed. Reg. 53419.

JURISDICTION

The petition of the Petitioner, United States Department of Transportation, sets forth the bases for jurisdiction of the United States Court of Appeals and this Court. On September 14, 1982, this Court issued an order extending time for filing responses to the petitions by the Respondents to no later than October 8, 1982, thirty days after the filing of the last petition in this matter. Since the Automotive Occupant Protection Association, the movant for leave to file this brief *amicus curiae*, supports the positions of the Respondents in opposition to the petitions for certiorari, it is timely filing this Motion and Brief Amicus Curiae, pursuant to the aforesaid permission for responses in opposition granted to the Respondents.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 706 and of the National Traffic and Motor Vehicle Safety Act of 1966, Title I, as amended, 15 U.S.C. §§ 1331 et seq. are reproduced in the Petitioner's Appendices to Petition for Certiorari, Appendix I, pp. 162a-171a.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company, No. 82-354, which seeks review of the decision and supplemental order of the Court of Appeals in this case.

STATEMENT OF INTEREST

The interest of the Automotive Occupant Protection Association is set forth in its Motion for Leave to File a Brief Amicus Curiae. The Automotive Occupant Protection Association refers this Court to the motion.

STATEMENT

This *amicus* adopts the Statement to be found in the Brief of Respondents, National Association of Independent Insurers, et al., but incorporates by reference herein as important background information the statement of the case and the passive restraint history to that date (*circa* 1978-1979) as found in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Pacific Legal Foundation* v. *Department of Transportation, et al.*, 593 F.2d 1338, 1340-1343 (D.C. Cir. 1979), cert. den., 444 U.S. 830 (1979).

REASONS FOR DENYING THE PETITION

The several Petitioners have proffered a variety of reasons why this Court should grant a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The respective Respondents will undoubtedly respond to these multifarious and alleged reasons point by point. This *amicus* shall, on the other hand, respond to selective reasons and arguments raised principally in the petitions of the United States Department of Transportation and the Motor Vehicle Manufacturers Association of the United States.

1. In the first two Questions Presented by the United States Department of Transportation, reliance is placed on "changed circumstances" as the keystone for the National Highway Transportation Safety Administration's (hereinafter referred to as NHTSA or NHTSA's) rescission of the passive restraint requirements of Federal Motor Vehicle Safety Standard 208. This *amicus* submits that in the main the changed circumstances consist of (a) the refusal of the automobile manufacturers to meet the "air bag" standard by in-

stalling automatic air bags; (b) the acceptance by NHTSA of the announced intentions of the industry being regulated to install a safety device (an easily detachable seat belt) which openly and defiantly thwarts the agency's safety rule and (c) the circumstance, ancillary to the safety issue, that the automobile industry is in economic doldrums.

If "changed circumstances" of this nature allow an administrative agency to reverse course 180 degrees on a safety issue most paramount to the American people, then there would appear to be no limit to administrative backing and filling to accommodate the wishes of the industry being regulated. This seems especially true where the original course set by NHTSA was not only upheld by the courts but withstood congressional assault.

2. The concern is raised by the Petitioner that "the decision below will serve as precedent in the District of Columbia Circuit, where the vast majority of petitions for review of administrative decisions are filed," substantially impeding "the ability of the agencies to revise their existing policies" and "chilling the agencies in their development of new policies for fear of judicial obstacles to subsequent modification." *Petition of the Motor Vehicle Manufacturers Association of the United States*, p. 16. This petition endeavors to have the court view the decision as having far-reaching effect on all future rulemaking petitions for review in the District of Columbia Circuit in line with this Court's opinion in *Vermont Yankee Nuclear Power*, where this Court was concerned with (and granted certiorari because of) the "additional procedural requirements" which the Court of Appeals proposed therein to "impose . . . on agency action." *Vermont Yankee Nuclear Power* v. *NRDC*, 435 U.S. 519, 535-537, n.14 (1978). To the contrary, here the Court of Appeals was not dealing with procedure or additional procedural requirements but with a substantive matter, the Federal Motor Vehicle Safety Standard 208. This Court of Appeals was uniquely cognizant of this standard, since it had previously upheld it in a very thorough opinion in

Pacific Legal Foundation v. *Department of Transportation, et al.*, 593 F.2d 1338, 1340-1343 (D.C. Cir. 1979), cert. den., 444 U.S. 830 (1979).

The decision of the Court of Appeals in the present case was only reached after a thorough and careful consideration of all the relevant factors and after a searching and careful inquiry, which led to the conclusion that there was a clear error of judgment on the part of the agency in placing the interests of the automobile industry over the safety of the American motorist. There was clear support in the court's opinion for the conclusion that the choice of the agency was arbitrary, capricious, an abuse of discretion and not in accordance with law. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

Again, this Court has well said that the responsibility of assessing a record to determine whether the position taken by an agency is correct "is not ours" but "*primarily* that of the Court of Appeals." This Court further stated that "it will intervene only in what ought to be the *rare instance* where the standard appears to have been *misapprehended or grossly misapplied.*" *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283, 310 (1974). *(Emphasis supplied.)* This situation does not here exist and we respectfully suggest that this matter be left to the Court of Appeals.

3. Though "to some FMVSS [Federal Motor Vehicle Safety Standard] 208 was always intended to be an air bag standard" (Pet. App. 63a) and it was suggested that the standard should "more descriptively [be called] the air-bag standard" *(Ibid.)*, the agency did not consider airbags in its analysis supporting rescission. As the Court of Appeals indicated, the agency did not deal with airbags as an obvious alternative in its analysis because "domestic manufacturers have decided to use" easily detachable seat belts rather than airbags to comply with the standard. The agency also indicated that "although benefits would be greater if [larger cars were equipped with airbags] it does not appear that this will happen." *Idem.*

In this Wilsonian-like approach,[2] the agency has placed the financial health of the domestic automobile industry over the safety of the American motorist. To it and its supporters, the phrase, *salus populi est suprema lex*, has little meaning, other than the mouthing of an ancient Roman. Such an arbitrary and capricious approach, alone, would require, or perhaps demand, that this Court of Appeals, steeped in the history of this Standard 208 from previous litigation on its docket, exercise its necessarily narrow jurisdiction as a reviewing court and rescind the action of the agency. See *Pacific Legal Foundation* v. *Department of Transportation, et al., supra.*

The clear and palpable turnabout by the agency after years of endeavoring to secure the safety of the driver and the car passengers by passive restraints represents an abnegation of responsibility by the agency, requiring the reviewing court to halt the arbitrary and capricious activities of the agency, as the latter completely ignored the intent of the safety statute.

The Petitioners here both urge that the Court of Appeals' approach as to alternatives, including airbags, was inconsistent with this Court's decision in *Vermont Yankee Nuclear Power Corporation, supra.* There is, however, a clear distinction between the action of the Court of Appeals in this case and this Court's teaching in *Vermont Yankee Nuclear Power Corporation.* This Court granted certiorari in the latter case, as we have previously shown, because questions of "significance" were raised by the Court of Appeals' view there that it could "impose additional *procedural requirements* on agency action. . . ." *Ibid.*, at page 537, fn. 14. *(Emphasis supplied.)* It is interesting to note that in endeavoring to stretch *Vermont Yankee Nuclear Power* to meet the facts of this case the Department of Transportation states that the Court of Appeals herein "should not have mandated a different *proce-*

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[2] Charles E. Wilson, sometime Secretary of Defense: "What's good for General Motors is good for the country!"

dure by insisting that the alternative it preferred be considered as a condition precedent to rescission . . ." *Petition of Department of Transportation*, p. 26.

As we have previously indicated, the fact of the matter is that the Court of Appeals herein was talking of a substantive matter, a standard, and had nothing to do with "additions to procedure" to obtain "a more adequate record," which the Court of Appeals had apparently sought in *Vermont Yankee Nuclear Power. Supra*, at p. 547. In a word, *Vermont Yankee Nuclear Power* has no applicability to the suggestion in this case by the Court of Appeals that the agency consider alternatives, including airbags.

4. The Petitioner, United States Department of Transportation, argues, as one of its main reasons for the granting of its petition that the Court of Appeals "exceeded the proper limits on judicial review" and/or "impermissibly preempted the agency's primary jurisdiction to make the further determination required by the Court's opinion," when on August 4, 1982 it ordered that "the compliance date of Federal Motor Vehicle Safety Standard 208, the passive restraint standard, are stayed until September 1, 1983 . . ." with the agency having the right to advise the Court by October 1, 1982 "whether such a compliance date is achievable, or whether a longer period is required, setting forth adequate reasons therefor." *Brief of Petitioner, United States Department of Transportation*, Question 3, p. (I) and pp. 26-28.

Both petitioners quote in some detail from the Court of Appeals' opinion of June 1, 1982 to show that the Court stated to the agency, *inter alia*, that (a) its decision does not foreclose rescission; (b) its remand to the agency was for the resolution of certain questions raised in the opinion and (c) that the agency recommend a timetable to the Court for agency analysis of the issues raised in the Court's Opinion.

There is not highlighted to this Court by the Petitioners, however, the concern of the Court of Appeals about foot-dragging on the agency's part when the matter was remanded

to it. In the same and successive paragraphs, in which is found the oft-quoted phrase, "our decision does not foreclose rescission," there also appear two stern warnings to the agency from the Court of Appeals: Firstly, the agency is warned that "[a]t the same time we should not simply remand this petition to the agency so that recalcitrance might succeed where rational decisionmaking might not." Pet. App. 72a. Secondly, in the succeeding paragraph, the Court of Appeals enunciates its bottom line as to its view of the failure of the agency properly to act when it forthrightly states that "[b]y rescinding the passive restraint standard without legal justification, NHTSA's arbitrary action presents *a paradigm of ineffective regulation.*" *(Emphasis supplied.)* It continues as follows:

> . . . Notice 25 has wasted administrative and judicial resources, and has possibly delayed without justification a safety standard that may be, "from an economic point of view, as important as any environmental, health, or safety rule now on the books." [Fn.: Comment of William D. Nordhaus, John Musser Professor of Economics at Yale University, May 26, 1981, J.A. 511, 514.] At present rates, 1 in every 60 children born today is expected to die in an automobile accident, and 2 out of every 3 will suffer injuries in a crash. *See* 126 Cong. Rec. S 13,503 (daily ed. Sept. 25, 1980) (Senator Warner). These figures may be low, for NHTSA concedes that the problem at which the passive restraint standard was aimed has become more urgent in recent years. *See* p. 15 *supra*. But the agency concludes Notice 25 by observing:
>
> > After 12 years of rulemaking NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits.
>
> 46 Fed. Reg. at 53,426. NHTSA may yet conduct the reasoned decisionmaking that can support the rescission of the passive restraint standard, but it may not reject twelve years of preparation for such a standard until it does so. The agency's action here thus represents "an expensive example of ineffective regulation" of the worst kind. [Pet. App. 73a.]

These warnings, however, failed. On July 1, 1982, the agency filed with the Court of Appeals a Notice of Proposed Rule-Making Procedure in "seeking the comments" within 30 days of the publication of the notice "of all interested parties on questions raised by the Court's opinion." The agency would propose after receiving and considering these comments to "issue any supplemental decision . . . within 45 days after the close of the comment period." Pet. App. 133a. The agency specifically proposed to request comments and suggestions on predicted use of automatic restraint systems in general, "on how studies to obtain reliable and statistically significant empirical evidence on usage may be feasibly undertaken in a reasonable period of time and at a reasonable cost," possible study formats involving the equipping of various numbers of private cars, fleet cars, etc. (to select but a few of the areas of information on which the agency proposed to invite comments and suggestions, if allowed to do so by the Court of Appeals). *Ibid.*, 135a. In spite of the admittedly "voluminous record of proceedings on this issue" which would undoubtedly result, the agency proposed that it would only require 75 days of delay to obtain, receive and evaluate the comments. *Idem.*, 133a.

In a word, the agency did not heed the warnings of the Court of Appeals in the June 1, 1982 Opinion of the court! The agency proposed to delay and delay, it proposed to recommence the rule-making or as the phrase goes, to "start all over again."

The remonstrances of the petitioner to the contrary, the Court of Appeals did not have to stand still or sit mute as the agency attempted to thwart its will.

As this Court has well said over four decades ago with language still pertinent to this day, a United States Court of Appeals is a court "with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." (Emphasis supplied.) Ford Motor Company* v. *National Labor Relations Board*, 305

U.S. 364, 373 (1938). *See also Zambrana* v. *Califano*, 651 F.2d 842, 844 (2d Cir. 1981), citing *Igonia* v. *Califano*, 568 F.2d 1383, 1389 (D.C. Cir. 1977), and *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17 (1952). Under the instructions of this Court in *Ford*, *supra*, it is clear that the Court of Appeals here acted properly, when its "comment" period had finally closed with a response or rebuttal from the agency, and when it directed the agency to discard the comment period (suggested by the agency) and based on its twelve years of preparation for such a [passive restraint] standard promptly make its response with the submission of "a schedule for resolving the questions raised in . . . [its] opinion, leading either to the rescission or suspension of the standard or to a judicially approved schedule for the effective implementation of that standard or an amended standard." Pet. App. 74a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

PHILIP R. COLLINS
1026 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 347-8899
Counsel for Amicus Curiae Automotive Occupant Protection Association

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Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PETITIONERS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, CHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.

December 23, 1982

[Counsel listed on inside cover]

Of Counsel:

WILLIAM H. CRABTREE
Vice President and
General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers
Association of the
United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and
General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SEIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
TERRENCE J. LEAHY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

MILTON D. ANDREWS
DONALD M. SCHWENTKER
LANCE E. TUNICK
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007

Counsel for Petitioner Automobile Importers of America, Inc.

* *Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. When a court of appeals concedes that an agency's reasons for rescinding prospective passive restraint regulations would have justified not adopting such regulations in the first instance, may the court reject these same reasons as arbitrary and capricious when used to support the agency's decision to rescind those regulations?

2. When an agency finds that changed circumstances create "substantial uncertainty" whether a previously issued regulation will achieve its purpose, may the court declare the agency's decision to rescind that prospective regulation arbitrary and capricious solely because the agency was unable to find that the regulation would *not* achieve its purpose?

3. May the court of appeals, when reviewing the exercise of an agency's broad statutory discretion, invalidate as arbitrary and capricious the agency's decision to rescind a prospective passive restraint regulation because the court divines a legislative "mandate" from congressional refusal either to require or prohibit passive restraints and its failure to veto the prospective regulation?

4. May a court of appeals invalidate an agency's rescission of its own prospective regulation as arbitrary and capricious on the ground that the agency should have considered regulatory alternatives that were neither raised by the agency's notice of proposed rulemaking nor foreclosed by the agency's rescission order under review?

5. Is it an unlawful invasion of the primary jurisdiction of an administrative agency for a court of appeals, after remanding an agency's rescission of its own regulation for further agency consideration, to reverse its own order and reinstate the regulation by a date certain, regardless of whether the further agency proceedings have been completed, and regardless of how the agency might resolve the issues remanded?

LIST OF PARTIES BELOW

State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, Leorlin Boyd, National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung were petitioners in the proceedings below. The Department of Transportation, Drew Lewis, the National Highway Traffic Safety Administration, and Raymond A. Peck, Jr. were respondents below. Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., Automobile Importers of America, Inc., Consumer Alert, Pacific Legal Foundation, and Albert B. Lewis, Superintendent of Insurance for the State of New York, were intervenors below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-354, 82-355, 82-398

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PETITIONERS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, CHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.[1]

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, *State Farm Mutual Automobile Insurance Co. v. DOT*, 680 F.2d

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[1] A list of parent companies, subsidiaries, and affiliates of the foregoing petitioners is set forth in the Appendices to Petition for Writ of Certiorari in No. 82-354 ("App.") at App. 172a-176a.

206 (D.C. Cir.), are reproduced at App. 1a. The court's subsequent unpublished Order and Memorandum of August 4, 1982, are reproduced at App. 79a. The rescission order of the National Highway Traffic Safety Administration ("NHTSA"), 46 Fed. Reg. 53419 (1981), is reproduced at App. 88a.

JURISDICTION

The judgment below was entered on June 1, 1982. App. 161a. Petitions for writs of certiorari in Nos. 82-354 and 82-355 were filed on August 30, 1982. Jurisdiction to review the court's judgment and its subsequent order is vested in this Court by 28 U.S.C. § 1254(1), as further provided in 15 U.S.C. § 1394(a)(4).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act" or "Act"), 15 U.S.C. §§ 1381 *et seq.*,[2] are reproduced at App. 162a, 163a.

STATEMENT OF THE CASE

The Safety Act authorizes the Secretary of Transportation to issue federal motor vehicle safety standards. It leaves the subject matter and content of each standard to the Secretary's discretion, subject to very narrow exceptions and within certain criteria laid down in the Act. The Secretary has delegated the exercise of this discretion to NHTSA in the first instance. 49 C.F.R. § 501.2(a)(1981).

Since 1968, Federal Motor Vehicle Safety Standard 208 ("Standard 208") has continuously required that new passenger cars have safety belts. 32 Fed. Reg. 2408, 2415

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[2] Act of September 9, 1966, Pub. L. No. 89-563, 80 Stat. 718, as amended.

(1967). *See* 49 C.F.R. § 571.208 (1981); App. 120a.[3] These belt systems are referred to as "active" belts, because occupants must "buckle up" for the belts to serve their function. In 1977, NHTSA amended Standard 208 to require "passive" rather than "active" occupant restraints beginning in September 1981 for large cars, September 1982 for mid-sized cars, and September 1983 for small cars.[4] The 1981 date was later extended by one year. In October 1981, following notice, comments and hearing, NHTSA rescinded those "passive" restraint provisions, 10 months before the effective date for large and mid-sized cars and 22 months before the effective date for small cars.

On June 1, 1982, the court of appeals invalidated NHTSA's rescission order as "arbitrary and capricious" under 5 U.S.C. § 706(2)(A). On August 4, the court ruled *sua sponte* that the rescinded requirements would go into effect on September 1, 1983, subject to further consideration by the court after receiving a report it requested from NHTSA as to whether this effective date

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[3] Standard 208 is one of approximately eighteen NHTSA standards designed to help protect occupants should an accident occur. Still others are designed to help prevent accidents in the first instance. *See generally* 49 C.F.R. pt. 571 (1981).

[4] "Passive" restraints—sometimes referred to as "automatic" restraints—are those that NHTSA describes as affording protection in frontal crashes "by means that require no action by vehicle occupants." *See id.* § 571.208 (S4.1.3(a)).

The two principal passive restraint technologies developed to date are airbags and passive belts. In a frontal impact, an airbag fills with gas as it deploys from the instrument panel or steering wheel/column assembly and restrains the forward-moving occupant. A "passive" or "automatic" belt restrains an occupant much as an "active" belt does when it is buckled up. In the design principally used, the passive belt has one end anchored near an edge of the door and incorporates a push-button release mechanism; so long as the belt is not detached from that anchorage, the belt will move away from and redeploy in front of the occupant as the door is opened and closed. This type of passive belt is generally referred to as detachable.

was "achievable." [5] App. 80a. NHTSA's report, filed on October 1, concludes that this date is not "achievable." MVMA Br. App. 39.[6] That report has not been acted on. On November 18 the court of appeals noted the issuance of writs of certiorari by this Court and recalled its mandate. J.A. 16.

A. The Statutory Scheme

The Safety Act authorizes NHTSA, as the Secretary's delegate, to issue "appropriate" federal motor vehicle safety standards. 15 U.S.C. § 1392(a). It requires that each standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." *Id.*[7] It also requires the agency to consider "whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed," as well as "the extent to which such standards will contribute to carrying out the purposes" of the Act. *Id.* § 1392(f). The Act also specifically grants to the agency authority to "amend or revoke" safety standards. *Id.* § 1392(e).

In the Motor Vehicle and Schoolbus Safety Amendments of 1974,[8] Congress established two limitations on

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[5] The court extended the effective date of the requirement for large and mid-sized cars by one year, to September 1983. App. 80a. For all other cars, the court reimposed the September 1983 effective date contained in the rescinded rule.

[6] Petitioners have filed with this brief an appendix reprinting portions of the agency's October 1 report, respondent State Farm's responses thereto, and NHTSA's reply to those responses. References to that appendix are cited as "MVMA Br. App. ——."

[7] The Safety Act further defines the term "motor vehicle safety" to mean "performance . . . in such a manner that the public is protected against *unreasonable* risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable* risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1) (emphasis supplied).

[8] Act of October 27, 1974, Pub. L. No. 93-492, 88 Stat. 1470.

the agency's authority to issue an occupant restraint standard. One of these amendments, a response to "swift and furious" public reaction (App. 33a) against NHTSA's requirement that active belts include ignition interlocks and continuous warning buzzers, prohibited any standard requiring or permitting such devices as a means of compliance. 15 U.S.C. §§ 1410b(a)-(b). Congress also prohibited NHTSA from adopting any occupant restraint standard requiring or permitting compliance "by means of . . . an occupant restraint system other than a belt system"—*e.g.*, compliance by means of an airbag system—except pursuant to a two-house legislative veto procedure and certain other statutory requirements. *Id.* §§ 1410b(b)-(d).[9]

B. The Decision To Require Passive Restraints (1969-1971)

NHTSA's rescission order followed a long and shifting series of regulatory proposals dealing with occupant restraints. Originally, Standard 208 simply required manufacturers to install the "active" safety belts which most manufacturers were voluntarily providing in new cars, and established performance criteria for these systems. 32 Fed. Reg. 2408, 2415 (February 3, 1967). As this requirement has evolved, it affords approximately the same protection in frontal crashes as passive restraints for those motorists who "buckle up" their belt systems,[10] and more protection in nonfrontal collisions than an airbag. R. 402, 447-48, 1259, 2128, 2252-53.[11] Because his-

[9] Where Congress wishes to direct NHTSA to adopt standards dealing with specific aspects of safety, it clearly knows how to do so. *See, e.g.*, 15 U.S.C. § 1392(i), directing NHTSA to adopt standards dealing with eight specific aspects of schoolbus safety.

[10] 41 Fed. Reg. 24070, 24071 (June 14, 1976). *See also Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1345 n.53 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979) (upholding the agency's discretion to issue the 1977 passive restraint requirements that were rescinded by the order under review in this case).

[11] References to the joint appendix filed in the court of appeals are cited as "R. ——."

torically too few motorists had buckled up, the agency announced in 1969 that it would propose that manufacturers install "inflatable occupant restraint systems" (*i.e.*, airbags), or other occupant restraint systems that require no action by vehicle occupants. 34 Fed. Reg. 11148 (July 2, 1969). NHTSA soon made clear that airbags would not be the sole means of compliance,[12] and it issued a series of additional notices, rules, and amendments[13] culminating in a mandatory passive restraint requirement under Standard 208. 35 Fed. Reg. 16927 (November 3, 1970); 36 Fed. Reg. 4600 (March 10, 1971); 36 Fed. Reg. 19254 (October 1, 1971).

C. The Elimination of Passive Restraint Requirements (1972-1977) and Their Reinstatement (1977-1981)

Several manufacturers petitioned for review of NHTSA's mandatory passive restraint requirement. In *Chrysler Corp. v. DOT*, 472 F.2d 659, 674 (6th Cir. 1972), the Sixth Circuit held that NHTSA's decision prospectively "to abandon active restraints in favor of passive restraints was a proper exercise of its administrative discretion," and that the "technology-forcing" aspect of the regulation was authorized under the Safety Act. However, the court invalidated as not "objective" the agency's specifications for the test dummies and procedures required to be used for compliance testing, and remanded to provide the agency an opportunity to correct this problem. *Id.* at 675-78. The court ordered that "the effective date for the implementation of passive restraints be delayed until a reasonable time after [new] test specifications are issued." *Id.* at 681. As a result of that decision,

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[12] *See* 35 Fed. Reg. 7187, 7187-88 (May 7, 1970); 35 Fed. Reg. 16927 (November 3, 1970). Hence, by mid-1970, the agency had changed the title of the proceeding from one involving "inflatable occupant restraint systems" to one contemplating "occupant crash protection" by any appropriate means. *Compare* 34 Fed. Reg. at 11148 *with* 35 Fed. Reg. at 7187.

[13] One such series of notices, initiated in 1971, proposed certain emergency release mechanisms for use with passive belts. This series of actions is described below. *See* pages 43-44 *infra*.

the passivity requirement lacked an effective date and a key element on which the performance criteria for passivity turned, *i.e.*, a legally sufficient test device and procedure. The result was an indefinite postponement of passive restraint requirements, although the standard continued to require active belt systems. *Ford Motor Co. v. NHTSA*, 473 F.2d 1241, 1242 (6th Cir. 1973). *See also* 38 Fed. Reg. 16072, 16073 (June 20, 1973); 38 Fed. Reg. 20449, 20450 (August 1, 1973).

In March 1974, NHTSA reproposed passive restraint requirements and new test dummy specifications. 39 Fed. Reg. 10271, 10272 (March 19, 1974).[14] Contrary to the apparent views of the court below, however (*see* App. 9a, 10a, 33a, 34a, 47a, 60a), the agency never adopted that proposal. After a comprehensive review, NHTSA proposed to revoke the incomplete passive restraint provisions of the standard still technically on the books after *Chrysler*, and noted that "[a] decision has not yet been made on the long-term requirements for occupant crash protection." 40 Fed. Reg. 16217 (April 10, 1975). NHTSA thereafter "replace[d]" those passive restraint provisions "suspended as a result of" *Chrysler* by extending the active restraint requirements of Standard 208 through August 31, 1976, and suggested that a further extension was likely. 40 Fed. Reg. 33977 (August 13, 1975).

Secretary of Transportation William T. Coleman, Jr. then personally reviewed the entire passive restraint issue. 41 Fed. Reg. 24070 (June 14, 1976). After further comments and hearings, he issued a 66-page decision (R. 2065) in which he extended the active safety belt requirements indefinitely, continued to permit passive restraints as an option for manufacturers, and deferred any decision to make passive restraints mandatory pending the

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[14] The new dummy specifications proposed for mandatory passive restraints were those previously issued for voluntary passive restraints. *See* 38 Fed. Reg. 20449 (August 1, 1973); 39 Fed. Reg. at 10272. *See also* 42 Fed. Reg. 7148 (February 7, 1977).

results of a large-scale voluntary demonstration program for passive restraints that he negotiated with four manufacturers.[15] Coleman emphasized that his decision "[did] not in any way foreclos[e] a future Secretary or Administrator of NHTSA . . . either to place a termination date on Standard No. 208 or to mandate passive restraints on some or all passenger cars." 42 Fed. Reg. at 5071.

Secretary Brock Adams quickly abrogated the demonstration program and reproposed mandatory passive restraints. 42 Fed. Reg. 15935 (March 24, 1977).[16] Adams endorsed many of the Coleman findings, but concluded that imposing a mandatory passive restraint requirement "is the logical result of those findings." 42 Fed. Reg. 34289, 34291 (July 5, 1977). Contrary to Coleman, Adams believed that "public acceptance or rejection of passive restraints is not one of the statutory criteria which the Department is charged by law to apply in establishing standards." *Id.* Adams set effective dates of September 1981 for large cars (over 114 inch wheelbase), September 1982 for mid-sized cars (over 100 inch wheelbase), and September 1983 for all other cars. *Id.* at 34289.[17] He projected that more than 60% of pas-

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[15] 42 Fed. Reg. 5071 (January 27, 1977). Under the agreements, General Motors, Ford, Volkswagen, and Daimler-Benz agreed to make provisions to sell to the public, at less than the cost of the restraint systems, a total of over 440,000 cars equipped with airbags and 60,000 cars equipped with passive belts. The agreements with GM and Ford included requirements for specific kinds of marketing and promotional efforts. R. 2003.

[16] The requirements proposed and adopted by Adams substantially lessened the requirements upheld in *Chrysler* in recognition of the knowledge gained in the meantime. *Compare* 36 Fed. Reg. 4600, 4604 (March 10, 1971) *and* 35 Fed. Reg. 16927, 16929-30 (November 3, 1970) *with* 42 Fed. Reg. at 15936 *and* 42 Fed. Reg. at 34296-97.

[17] The effective date for large cars was later extended by one year. 46 Fed. Reg. 21172 (April 9, 1981).

sive systems would be airbag systems,[18] and made no finding concerning whether the detachable passive belts also permitted under the rule would actually be used by vehicle occupants.[19] The Adams decision was sustained on review. *Pacific Legal Foundation v. DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).[20]

D. NHTSA's Decision in This Case

In April 1981, Secretary Lewis initiated the action here under review. App. 147a. He noted that NHTSA's decision in 1977 "was based on a variety of key assumptions which, in the light of subsequent events, are no longer valid" (App. 150a)—principally its assumption that at least 60 percent of passive restraint systems installed by manufacturers would be airbag systems. By 1981, the agency found, almost all manufacturers were planning to employ passive belts. *Id.*[21] Secretary Lewis further noted

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[18] App. 95a. This projection was based on the assumption that larger cars would be equipped with airbags and that most smaller cars would be equipped with passive belts. *See* R. 164-65.

[19] The agency's "[n]ominal [p]rojection" of passive belt usage was 60%. 42 Fed. Reg. at 34298 & n.6.

[20] The court found that the statutory criterion of practicability required Adams to consider the public reaction to passive restraint requirements, and that despite his contrary assertion he had properly done so. 593 F.2d at 1345-46 & n.52.

[21] Between 1977 and 1981, consumer demand for large cars had slipped while demand for small cars had grown enormously. App. 151a. As a result of this change in consumer preferences, the expected percentage of cars with passive belts increased substantially. *See* note 18 *supra*. Because of economies of scale, this change would in turn have substantially increased the cost of airbags. *See, e.g.*, App. 151a, R. 170-72. Depending on assumptions about production levels, cost estimates ranged from about $200 to $1200 per car. *Id.* Manufacturers were accordingly electing to comply with Standard 208 by providing passive belts "because of the competitive disadvantage of offering the relatively expensive and inadequately understood airbag when other manufacturers would have been providing automatic belts." App. 96a-97a. Moreover, since airbags would still require use of a lap belt to protect occu-

the accelerated switch from large to small cars "due in large measure to the subsequent oil cutoff of 1979" (App. 151a), and "the unlikelihood of public acceptability" of passive restraints. App. 154a. He therefore proposed three alternative courses of action: (1) reversing the phase-in sequence to require compliance by smaller cars first, (2) requiring simultaneous compliance for all cars, or (3) rescinding the passive restraint requirements.

After further comment and hearing, NHTSA elected the third option. It concluded that its 1977 calculations of the benefits of passive restraints had been "substantially if not wholly undermined by [the] drastic changes" in events identified in its notice of proposed rulemaking. App. 96a. NHTSA had assumed in 1977 that airbags would be installed in most new cars, and it had then further assumed—without any proof or findings—that the passive belts installed in the remaining minority of cars "would be used by 60 to 70 percent of the occupants of those cars." App. 95a. Whether that assumption about usage rates had been correct was now "the most important issue" (App. 94a), because virtually all manufacturers planned to comply by installing detachable passive belts.

After analysis of the available data on usage rates of passive belts that had been installed voluntarily by manufacturers, NHTSA concluded that this data did not support any reliable predictions about increased usage rates of passive belts. App. 95a-104a. It did so primarily for two reasons. First, the existing data involved passive belt systems with coercive features that forced motorists to use them through ignition interlocks or continuous nondetachable belts—systems critically different from those that manufacturers planned to install to comply

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pants in nonfrontal collisions (R. 402, 1259, 2128, 2252-53), manufacturers believed "[i]t would be very difficult to explain to current belt users that they should pay hundreds of dollars more and still have to fasten a lap belt to obtain the safety benefits they now have." R. 402.

with the prospective standard. App. 97a, 102a.[22] Second, the data were limited to users of passive belts provided as optional equipment in certain subcompact cars, for which even *active* belt use is generally substantially higher than the prevailing rate for active belts in all cars.[23]

NHTSA found it could not "reliably predict even a 5 percentage point increase as the minimum level of expected usage increase" with detachable passive belts as the primary form of compliance with the standard:

> "The adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts. Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase." App. 104a.

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[22] As noted above, the 1974 amendments to the Safety Act prohibited any occupant restraint standard that required or permitted compliance by means of interlocks. NHTSA found that most manufacturers planned to use a detachable type of passive belt, *e.g.*, a belt that could be readily detached from its anchorage and that would not provide any restraint until reattached. App. 97a. One manufacturer planned to use on its luxury models a nondetachable belt that could be loosened by unwinding webbing from an automatic spool. R. 304-06.

[23] *See, e.g.*, R. 850. NHTSA found this VW Rabbit and GM Chevette data unreliable for other reasons as well, including the fact that the Chevette and Rabbit owners had "voluntarily" invested in passive restraints and were therefore "more likely to use those restraints than someone who is compelled to buy them." App. 98a. The existence of such a self-selection bias was supported by evidence in the record (*e.g.*, R. 1721) and by the agency's own prior judgment. *See DOT and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 523 (1977) (Administrator Gregory).

This weak prospect as to an increase in usage rates made it impossible for NHTSA to conclude that "the standard is at this time reasonable and practicable" (App. 88a) or that the requirements "would meet all of the applicable criteria in the Vehicle Safety Act" (App. 93a), particularly in light of the substantial costs of passive belts and the need to foster public acceptability. App. 105a, 107a-109a. Accordingly, NHTSA rescinded the requirements. The agency considered and rejected the alternative idea of requiring "use-compelling"—*i.e.*, non-detachable—passive belts. App. 109a-110a. *See* pages 42-45 *infra*.

E. The Decisions of the Court of Appeals

On December 7, 1981, the court of appeals denied the motion for stay filed by respondents here, and set an expedited briefing schedule. App. 86a-87a. The court also instructed all parties "to address in their briefs the amount of time that will be required by the agency and by the affected automobile manufacturers to take appropriate action in the event that this Court invalidates" NHTSA's action. App. 87a.

On June 1, 1982, the court set aside NHTSA's decision to rescind as "arbitrary and capricious" because the court thought NHTSA's "substantial uncertainty" about usage rates with detachable passive belts was a legally insufficient reason for rescission. App. 51a-54a.[24] The majority also held that it was arbitrary to rescind before analyzing "obvious alternatives to rescission" (App. 49a), ranging from continuous or flashing dashboard lights to show when detachable belts were detached, to speed controls, to an airbag-only standard. App. 62a-

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[24] The court attempted to undercut NHTSA's conclusion that the record did not support any reliable findings about expected usage rates. *See, e.g.*, App. 52a n.30. But NHTSA had ample basis to support its doubts on usage rates, as the court acknowledged when it noted that "[t]here may well be 'substantial uncertainty' " about expected usage rates. App. 51a. *See* pages 10-11 *supra*.

68a. The majority also rejected as "hollow" the agency's stated reasons for choosing not to amend Standard 208 at this time to prohibit detachable belts. App. 56a-62a.[25]

The court held that its remand "d[id] not foreclose" agency action suspending or rescinding the passive restraint requirement. App. 72a. *See also* App. 54a. It specifically "decline[d] the suggestions" of respondents here that it order the passive restraint provisions into effect by September 1982 or September 1983. App. 72a.[26] Instead, it required the agency to "recommend to us" (App. 72a) within 30 days "a schedule for resolving the questions raised in this opinion . . . ." App. 74a.

NHTSA thereafter filed a proposed schedule (App. 130a) that the court held "not inconsistent with the Court's order." App. 82a.[27] Nevertheless, it announced on August 4 that "Standard 208 remains fully in force" pending agency rulemaking proceedings, and that manufacturers remained under a duty to comply with the present version of the standard. App. 81a. Notwithstanding its prior refusal to adopt a specific date upon which a standard would become effective, the court "stayed" the effective dates for all new cars until September 1983.[28] It gave NHTSA until October 1, 1982,

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[25] Judge Edwards' concurring opinion "d[id] not accept" the failure to consider alternatives "as a basis for decision in this case." App. 75a.

[26] As noted above, the court had ordered the parties to address lead time issues in their briefs. *See* page 12 *supra*.

[27] The agency proposed to solicit comments on the issue of predicted usage, particularly of detachable passive belts, and proposed guidelines for studies of this issue. It also proposed to solicit suggestions for other regulatory alternatives. Finally, the agency outlined steps it was taking to develop a program for voluntary introduction of airbag options in new car lines, including the possible participation by federal government fleets in this demonstration program. App. 132a-138a.

[28] Actually, the court stayed the effective date of the passive restraint requirements only for large and mid-sized cars, and only

"to advise the Court . . . whether a longer period is required, setting forth adequate reasons therefor." App. 80a.

In its October 1 report, NHTSA submitted that it was not the province of the court to set effective dates under the Safety Act. MVMA Br. App. 44-45. NHTSA also reported that manufacturers could not comply with the effective dates reestablished by the court's order, or practicably with any other date earlier than September 1985. *Id.* at 44 & n.* Respondents here disputed that judgment. *Id.* at 53, 68. Before the court of appeals took any further action, this Court granted the petitions for writ of certiorari, and the court of appeals recalled its mandate *sua sponte*. J.A. 16.[29]

SUMMARY OF ARGUMENT

Despite the long history and technical complexities of the passive restraint portion of Standard 208, the issues on review are simple.

I

The court of appeals did not take issue with any of the three ultimate findings that persuaded NHTSA to exercise its statutory discretion to rescind the passive restraint parts of the standard before their effective dates. But the court ruled that, while the third of these findings would have justified a decision not to issue the standard in the first instance, it was an insufficient basis for rescinding a standard that had already been issued. In so doing, the court of appeals misread the scope of the agency's rulemaking discretion under the Safety Act and

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until a date it had previously rejected. App. 81a. For small cars, the original September 1983 compliance date was not "stayed," but reaffirmed.

[29] On November 19, petitioner Automobile Importers of America, Inc. filed with the court of appeals a motion seeking to clarify the effect of this recall of mandate. The court of appeals denied this motion on December 8, again citing this Court's grant of petitions for writ of certiorari. J.A. 18.

the permissible scope of judicial review under the arbitrary and capricious standard of the APA.

The agency's third finding was that because of changed circumstances since the passive restraint requirement had been adopted in 1977, there was now "substantial uncertainty" whether the requirement would result in a large enough increase in belt usage to justify its billion dollar annual cost. The court of appeals conceded "[t]here may well be 'substantial uncertainty,'" but said this was not the decisive issue. In the court's view "NHTSA turned the question on its head" by asking "whether evidence shows that usage rates will increase by the necessary amount"; instead NHTSA should have asked "whether there is evidence showing they will not." App. 51a.

We submit that it is the court of appeals, not NHTSA, that has turned the question "on its head." The court's assertion that uncertainty cannot be a reason for decision defies both logic and experience. Nowhere is this more true than in regulatory decisions in the field of technology, where predictive judgments must often be made under conditions of uncertainty, and flexibility is especially necessary so that policies may be altered in the light of changing events. By denying these realities, the rule laid down by the court of appeals would produce regulatory paralysis, and saddle the economy with $1 billion of added costs annually despite uncertainty that any benefit will result. While the court acknowledged that substantial uncertainty would justify a decision not to regulate in the first place, it gave no valid reason for its position that the same uncertainty over whether an existing prospective regulation will achieve its objective is an insufficient reason for deregulating. The court's only justification was that substantial uncertainty does not justify changing the regulatory "status quo." App. 51a. This principle of administrative inertia is neither good law nor good practice.

II

The court of appeals improperly sought to justify the extraordinary burden it placed on the agency by reading several legislative events occurring after passage of the Safety Act as a congressional "mandate" to NHTSA to adopt a passive restraint standard. App. 74a.

As the court of appeals conceded, "[N]one of these [legislative] acts carries the weight of positive law, of course." App. 46a. As the court also recognized, the Safety Act does not direct the Secretary to issue particular safety standards for passenger cars; it gives him discretion to issue "appropriate" standards within the parameters laid down by the Act. It is not permissible to interpret subsequent legislative events short of "positive law" as narrowing the agency's discretion under the Safety Act or increasing the scope of judicial review under the arbitrary and capricious standard.

In any event, the court of appeals read these legislative events in a highly selective and speculative fashion. For every event cited by the court to show that some legislators, or even a majority of one or both houses, favored allowing or requiring the agency to adopt a passive restraint standard, there is another event showing that other legislators, sometimes also a majority, favored forbidding the agency to issue such a standard. The fairest reading of all these events is that while Congress from time to time considered requiring or banning a passive restraint standard, it never did so. The farthest Congress actually went was in the 1974 amendment placing limits on the content of any passenger restraint standard the agency might issue. Within those limits, Congress left the agency free to exercise its own expert discretion on whether passive restraints should be required at all, and if so, what the details of that requirement should be.

It is true, of course, that subsequent congressional failure to change the way in which an agency has long con-

strued its statutory authority has in certain cases been interpreted as confirming that construction. But that principle cuts against, not in favor of, the conclusion reached by the court below. In this case, the agency historically has always construed its governing statute as conferring discretion either to issue or not to issue some form of passive restraint standard.

III

There was no factual or legal basis for the majority holding that NHTSA's rescission order was arbitrary and capricious on the additional ground that the agency had failed to consider "obvious" alternatives to rescission. In fact, (1) the agency had proposed not only rescission but also two other alternatives in its April 1981 notice of the proceeding that resulted in the rescission order, (2) the agency's order did consider and reject one of the additional alternatives advanced by the majority (forbidding compliance by means of detachable belts), and (3) the agency had considered and rejected, in earlier phases of Standard 208 and other proceedings, an "airbag only" requirement and virtually all of the other suggested courses mentioned by the majority.

Agencies cannot consider every possible alternative before acting, and this Court has never required them to do so. To the contrary, agencies should be granted leeway to set their own procedural agenda, especially where their actions do not foreclose the future adoption of other possible alternatives. That is true of the rescission action here, and the agency has confirmed its intention to continue its study of how best to increase the usage rates of passenger restraints.

IV

Even if its June 1 judgment and opinion were correct, in its further order of August 4 the court of appeals

usurped the agency's primary jurisdiction to determine, subject to judicial review, whether the effective date of the reinstated passive restraint requirement should be postponed to later dates, fixed now, or stayed until any necessary new dates can be fixed when the agency completes further proceedings following the court's reversal of the rescission order.

ARGUMENT

I. THE BURDEN-SHIFTING RULE ANNOUNCED BY THE COURT OF APPEALS IMPROPERLY RESTRICTS THE DISCRETION OF ADMINISTRATIVE AGENCIES TO MODIFY THEIR POLICIES IN LIGHT OF CHANGING EVENTS.

The fundamental error of the court's unprecedented opinion lies in the five-page section entitled "Modified Standard 208 as Written." App. 50a-54a. In those five pages, the court seriously undermines the discretion of administrative agencies to modify prospective regulatory policies when changes in circumstances create substantial uncertainty whether those policies will actually serve their intended purpose.

The court of appeals upheld as reasonable two of the agency's three key conclusions: (1) that manufacturers intended to comply with the passive restraint requirement primarily by installing detachable passive belts, and (2) that once detached by vehicle occupants, those belts would be functionally equivalent to existing active belts. App. 50a. The court's difficulty arose with the agency's third conclusion: "[t]he rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up." App. 51a.

The court agreed that "[t]here may well be 'substantial uncertainty' about the seatbelt usage rates that can

be predicted if detachable belts are widely used." [30] But it ruled that substantial uncertainty was a legally insufficient basis to justify NHTSA's exercise of its statutory discretion to rescind. The court held that it was the duty of the *agency* somehow to dispel that uncertainty, and that if it did not have the evidence to do so,[31] the rescission order could not stand:

> ". . . [T]he question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so. This evidence may take the form of statistical data or logical argument, but it must exist in some form. To state this point in the reverse, it would be unreasonable for an agency to promulgate a regulation simply because of 'substantial uncertainty' that the status quo was any better. There must be *some* reason to support *any* reasoned decision." App. 51a (emphasis in original).

The court's assertion that uncertainty as to the effects of a prospective rule forecloses a decision to rescind that rule breaks sharply with prior precedent. It violates the established principle that the "arbitrary and capricious" standard of the APA "presumes the agency's action to be

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[30] The principal respondents in this Court have acknowledged this uncertainty. Many insurance companies, including respondent State Farm, testified before NHTSA that they refused to provide premium discounts for owners of cars with passive belt systems in advance of substantial on-the-road experience as to the effects of those systems. R. 1241-42, 2550-51. *See also* App. 106a.

[31] The court purported to require either evidence or "logical argument." App. 51a. As shown below, however, it completely ignored NHTSA's logical explanation of its refusal to continue the 1977 regulation in the face of changed circumstances. *See* pages 26-27 *infra*.

valid,"[32] and that that standard places "[t]he burden of overcoming this presumption . . . upon the party challenging the agency action."[33]

The court's rule also defies both logic and experience. Uncertainty is a normal human condition. Nowhere is this more true than regulation in the field of technology, where many regulatory judgments must be made in the absence of conclusive proof. The rule laid down by the court of appeals denies these realities and fosters regulatory paralysis. Just as substantial uncertainty is a sufficient reason for *not regulating* in the first place—as the court below conceded (App. 51a)—so must substantial uncertainty over whether a regulation will achieve its objective be sufficient reason for *deregulating*. This is especially so when, as here, the regulation is still prospective and substantial costs of compliance would otherwise have to be incurred before the regulation takes effect and over the indefinite future thereafter.[34]

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[32] *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976), *citing Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935). *See also Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (citing *Pacific States Box*). The court of appeals expressly declined to follow this established rule. *See* App. 31a n.19.

[33] *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 n.28 (D.C. Cir. 1981). In *Telocator Network of America v. FCC*, 691 F.2d 525, 539 n.114 (D.C. Cir. 1982), for example, the court concluded that it would be "manifestly unsound" to hold that "the agency had the responsibility of proving in the first instance that [its proposal] was successful" before those challenging it have any obligation to adduce evidence to the contrary. *See also WBEN, Inc. v. United States*, 396 F.2d 601, 610-14 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (Friendly, J.).

[34] NHTSA found the annual savings in variable manufacturing costs and consumer costs of rescission to be $1 billion; it also estimated the annual savings in fuel costs achieved by preventing a weight-related degradation of fuel economy at $150 million. App. 117a.

The court of appeals offered no rationale or authority supporting its position beyond its assertion that substantial uncertainty does not justify changing the regulatory "status quo." [35] This principle of administrative inertia is neither good law nor good practice. As this Court has long held, "administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). This "ability to adapt to new circumstances in a flexible manner" is "[o]ne of the most significant advantages of the administrative process." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 811 (1978). *See also American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967):

> "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."

Such flexibility is especially appropriate and necessary in the promulgation of rules of general applicability.[36] NHTSA's discretion to set safety standards is a perfect example. The Safety Act requires NHTSA to engage in a difficult balancing of conflicting policies to determine whether a standard is "appropriate" under the Act. *See* page 4 *supra*. Although safety is the "overriding consideration," the Act also requires NHTSA to consider

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[35] The only authority cited in this entire five-page section of the court's opinion was *National Ass'n of Demolition Contractors, Inc. v. Costle*, 565 F.2d 748, 751-52 (D.C. Cir. 1977). *See* App. 53a. This citation is baffling. That case held that it was *not* arbitrary for EPA to have determined that demolition sites were a major source of asbestos emissions *without* engaging in "newly developed tests to measure asbestos emissions." 565 F.2d at 751.

[36] *See generally National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 681-84 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

whether the proposed standard is "reasonable, practicable and appropriate." *H & H Tire Co. v. DOT*, 471 F.2d 350, 356 (7th Cir. 1972) (Stevens, J., concurring). This balancing process is an "inherently legislative . . . task," with "many analogies to a legislative committee hearing." *Automotive Parts & Accessories Association, Inc. v. Boyd*, 407 F.2d 330, 336, 338 (D.C. Cir. 1968). An agency engaged in making such essentially legislative judgments should be permitted to adapt its policy not only to take account of "[c]hanges . . . in objective circumstances," but also to provide for changes "in the way the agency perceives the critical facts." *FTC v. Texaco, Inc.*, 555 F.2d 862, 893-94 (D.C. Cir.) (*en banc*) (Leventhal, J., concurring), *cert. denied*, 431 U.S. 974 (1977).

Underlying the truism of the court of appeals that there must be "some" reason for "any" decision (App. 51a) is the premise that the reason given for rescinding a regulation—even a prospective one—must be much stronger than the reason for not issuing the regulation in the first place. That premise is contrary to the many decisions upholding agency discretion to modify prior policies in light of changing circumstances. There is no reason to believe that the agency "should be limited to building on the status quo." *General Telephone Co. v. United States*, 449 F.2d 846, 863 n.16 (5th Cir. 1971). *Accord, United States v. Midwest Video Corp.*, 406 U.S. 649, 673-74 n.31 (1972). And there is certainly no reason why continuing the regulatory "status quo" should be presumed more rational than the agency's decision to change a rule when changed circumstances create substantial uncertainty that the rule will accomplish its purpose.[37]

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[37] The court also acknowledged that "the perpetuation of a regulation also involves a decision that its continuation is worthwhile," App. 54a, and it appeared to hold that under the conditions of uncertainty present in this case NHTSA "could reasonably have decided to suspend or amend the regulation," so long as it did not "abando[n] [the regulatory program] altogether." *Id.* NHTSA did

This Court's decision in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), reflects precisely that view. In upholding the FCC's rescission of its policy of regulating radio program formats, the Court noted the agency's conclusion that it "'would have no assurance that [FCC regulation of such formats] would contribute more to listener satisfaction than the result favored by station management.'" *Id.* at 596. It concluded that such "predictions" and the decision whether regulation was appropriate under the circumstances lie "within the institutional competence of the Commission" and are "entitled to substantial judicial deference." *Id.*[38]

The established flexibility of administrative agencies to respond to changing circumstances is particularly necessary in a regulatory scheme, like the Safety Act, in which the agency is called upon to make difficult predictive judgments in advance of any real-world statistical proof.[39] In *American Textile Manufacturers Institute*,

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not "abandon" passive restraints "altogether." It decided to undertake an educational program to increase the buckling up of active belts, and, like Secretary Coleman in 1976, held that "rescission does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize." App. 115a.

[38] This Court's decision in *WNCN* was recently relied upon by a different panel of the court of appeals in *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). In that case, the FCC had concluded that "contrary to its former belief" its policy of regulating multiple ownership in the 50 largest television markets—a policy that had been in effect since 1964—was not fulfilling its objectives. *Id.* at 999. The court of appeals rejected a challenge—virtually identical to the theory devised by the court of appeals in this case—that the agency "did not meet its burden of proving that no harmful effects would flow from repeal of the Policy, but relied instead on a barren record." *Id.* at 1001. The court held that such "an independent study" was not required, and that "[a]n agency need not seek out all available information on the subject before it." *Id.*

[39] As Secretary Adams himself recognized in requiring passive restraints in 1977, "[s]tatistical 'proof' . . . is often not available to

Inc. v. Donovan, 452 U.S. 490, 522-30 (1981), this Court upheld OSHA's cotton dust standard despite the uncertainty recognized by the agency as to the predicted compliance costs:[40]

> ". . . [T]he agency's candor in confessing its own inability to achieve a more precise estimate should not precipitate a judicial review that nonetheless demands what the congressionally delegated 'expert' says it cannot provide." *Id.* at 528 n.52.[41]

The discretion (and indeed the duty) of agencies to change regulations promulgated under conditions of uncertainty about the future is "necessarily the price" of the deference afforded them in plotting the course of regulatory programs.[42] In other words, if agencies are

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resolve public policy decisions." 42 Fed. Reg. at 34292. *See also DOT and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 549 (1977) (NHTSA recognized there existed "only very limited field data to make a judgment call on mandating the passive restraint systems").

[40] Another panel of the court of appeals has similarly observed that "[t]o insist upon concrete proof that a proposed innovation will succeed without undesirable side effects would be effectively to relegate the [agency] to preserving the status quo." *Telocator Network of America v. FCC*, 691 F.2d 525, 542 (D.C. Cir. 1982). *See also Malrite T.V. v. FCC*, 652 F.2d 1140, 1150 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982); *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 474 n.18 (D.C. Cir. 1974):

> "Where existing methodology or research in a new area of regulation is deficient, the agency necessarily enjoys broad discretion to attempt to formulate a solution to the best of its ability on the basis of available information. Permian Basin Area Rate Cases, 390 U.S. 747, 811 . . . (1968)."

[41] *See also Natural Resources Defense Council, Inc. v. NRC (Vermont Yankee III)*, 685 F.2d 459, 543, 545 (D.C. Cir.) (Wilkey, J., dissenting), *cert. granted sub nom. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 51 U.S.L.W. 3404 (U.S. November 29, 1982) (Nos. 82-524 *et al.*).

[42] *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982). *See also WBEN, Inc. v. United States*, 396 F.2d 601, 614 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968). NHTSA itself

expected to regulate despite their lack of "perfect clairvoyance," those subject to the regulatory scheme cannot object simply because that scheme is later altered to reflect the agency's later recognition of what was not apparent to it earlier. *See United States v. Midwest Video Corp.*, 406 U.S. 649, 673-74 n.31 (1972).

The Sixth Circuit made precisely this point in upholding NHTSA's earlier action in its *Chrysler* decision. The court there recognized that NHTSA's discretion to adopt "technology forcing" passive restraint requirements carried with it the discretion "to extend the time for implementation or to alter, or even to abandon, the project" in the light of subsequent developments. 472 F.2d at 672. The Ninth Circuit reached the same conclusion in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 642 (9th Cir.) *cert. denied*, 439 U.S. 862 (1978) (NHTSA, in promulgating an amended truck brake standard, "had a responsibility to examine the results of its rulemaking" in light of subsequent vehicle experience).[43] Indeed, where basic changes in the regulatory environment have occurred, agencies may be *required* to alter past regulatory policies.[44] But whether

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has recognized its ongoing obligations to review its policies with respect to the occupant restraint program, both in 1976 and 1981. *See* pages 8, 22 n.37 *supra*.

[43] By substantially impairing the ability of administrative agencies to review the effects of their policies in the light of changing events, the court of appeals has thus created significant disincentives to innovative regulation in the first instance. In *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), this Court overturned a D.C. Circuit order reversing an FCC decision not to apply a new concentration of ownership rule to existing combinations. The Court held that if new rules must be applied retroactively, "the [agency's] ability to experiment with new policies would be severely hampered." *Id.* at 811.

[44] *See Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979); *accord, WWHT, Inc. v. FCC*, 656 F.2d 807, 818-19 (D.C. Cir. 1980) (quoted at App. 32a); *cf. Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924) (Holmes, J.) (upholding Fifth Amendment challenge to post-war continuation of wartime rent regulations).

or not NHTSA was *required* in this case to rescind its passive restraint requirement in light of the changed circumstances casting substantial uncertainty on its underlying premises,[45] it clearly had discretion to do so.

Of course, where the agency has made a "departure from prior norms," it has a "duty to explain [that] departure";[46] "[t]here may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."[47] But contrary to the court of appeals' view (App. 47a), NHTSA's action here was not a departure from prior norms. No mandatory passive restraint regulation has ever become effective. The prospective requirement for passive restraints issued in 1970 was never readopted after it was invalidated by the Sixth Circuit in 1972, and was in fact ultimately revoked in 1975. *See* pages 6-8 *supra*. Secretary Adams issued a more limited form of passive restraint regulation in 1977. This 1977 decision rescinding the Coleman demonstration program was specifically upheld as a permissible exercise of the agency's discretion even though it was a departure from the policy of the five preceding years, *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979),[48] because Adams "provided

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[45] NHTSA's determination as to the "primary empirical problem" (App. 50a n.27) of usage rates was so fundamental to its statutory discretion that, had the agency continued the passive restraint requirement despite the changed circumstances reflected by the record, its decision might not have been sustainable on review.

[46] *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

[47] *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring specially), *rev'd on other grounds*, 382 U.S. 46 (1965).

[48] The court of appeals' suggestions about a "consistent administrative interpretation" by NHTSA (App. 47a; *see* App. 30a-31a)

a sufficient explanation why his judgment differed from his predecessor's." The agency justified the reasons for its action more than adequately here. NHTSA explained that its earlier (Adar 3) decision had been based upon predictions about usage rates for passive restraints that were no longer valid, predictions that went to the heart of what the court of appeals recognized as the "primary empirical problem" of belt usage rates. App. 50a n.27.

The court of appeals required far more from NHTSA than a reasoned explanation of its decision to rescind the passive restraint requirement. It required proof by the agency that the detachable passive belts that would have been used to comply with the requirement would *not* increase usage rates by a significant amount. The court did so despite its recognition of the "total absence" of such data, App. 52a n.30: "NHTSA could have conducted surveys or experimented with detachable belt prototypes, or it could have explained logically why usage rates with detachable belts would increase less than 13 percentage points." App. 53a. Such a requirement of "proof" for a prediction of this kind was completely inconsistent with the established discretion of agencies to regulate in conditions of uncertainty—as NHTSA did in 1970 and again in 1977—and their correlative discretion (if not their duty) to modify those existing regulatory policies when new circumstances create substantial uncertainty about the wisdom of continuing them. *See American Textile Manufacturers Institute, Inc. v. Donovan, supra*, 452 U.S. at 522-30. To undermine that discretion is to undermine the vitality and flexibility that have long been recognized to be among the unique advantages of the administrative process.

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simply reflect an inaccurate view of the regulatory history of Standard 208. *See* pages 5-9 *supra*.

II. THE COURT'S UNPRECEDENTED USE OF POST-ENACTMENT LEGISLATIVE EVENTS IMPROPERLY BROADENED THE PERMISSIBLE LIMITS OF REVIEW UNDER THE ARBITRARY AND CAPRICIOUS STANDARD.

Unable to find any precedent for its conclusion that substantial uncertainty is not sufficient ground for rescinding a regulation, the court resorted instead to an extraordinary 25-page exegesis of legislative events which it admitted did not amount to "positive law." App. 46a. It held that this "congressional reaction" (App. 32a) to various versions of Standard 208 "raise[d] doubts" that NHTSA's rescission "necessarily demonstrates an effort to fulfill its statutory mandate" (App. 32a). It ruled that to satisfy these doubts the agency had to provide "increasingly clear and convincing reasons" (App. 48a) for its action. This admittedly "unusual" (App. 32a) expansion of the "arbitrary and capricious" standard infects every aspect of the court's review.[49]

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[49] Though recognizing that the provisions of the Safety Act itself give the agency discretion whether to issue a regulation like Standard 208 (App. 31a), the court variously stated that NHTSA's decisions must be "in accordance with the purposes for which power has been delegated" (App. 4a); that "an agency is not a legislature" (App. 31a); that in this case there are "'danger signals' that the will of Congress is being ignored" (App. 31a); that agencies "have no authority to act inconsistently with their statutory mandate" (App. 32a); that it was required to consider "the extent to which NHTSA's action may be inconsistent with the congressional purpose" (*id.*); that searching review was essential "lest the congressional will be ignored" (App. 46a); that "NHTSA is not writing on a clean slate" (App. 47a); that scrutiny depended upon the extent of "deviat[ion] from congressional expectations" and "the path marked by Congress" (App. 48a); that NHTSA "violates its basic legislative mandate" (App. 49a); that "NHTSA lost sight of its statutory obligation" (App. 56a); that "NHTSA errs when it presumes that it knows how to speak more clearly than Congress" (App. 63a); that "NHTSA may not confuse its

A. The Court Focused Only on Certain Post-Enactment Events To Reach a Totally Unsupported and Highly Speculative Conclusion About the "Will of Congress" That Congress Never Expressed in Positive Law.

The extraordinary standard of review imposed by the court of appeals was based on its interpretation of three instances of "congressional reaction" to various agency proposals for passive restraint requirements during the years following enactment of the Safety Act. Even if it had been employed as a means of statutory interpretation—which it was not [50]—the conclusion drawn by the court from these events would have been completely unfounded.

The 1974 amendments. The first "reaction" was that Congress did not prohibit NHTSA from adopting a mandatory passive restraint standard when it enacted the 1974 amendments to the Safety Act. *See* App. 33a-36a. But this cannot logically be read as a statutory mandate that NHTSA must adopt a passive restraint requirement, especially since in 1974 it was far from clear what passive restraint requirement, if any, NHTSA would adopt. As one of the principal spokesmen for the amendments in the Senate recognized, "[t]he issue of what constitutes the ideal restraint system is far from settled." 120 Cong. Rec. 30839 (1974) (Sen. Eagleton). The primary concern of Congress both in proposing and in adopting the 1974 amendments was not to limit NHTSA's discretion whether or not to adopt a passive restraint standard, but to limit

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role with that of Congress" (App. 71a); and that "agencies may not ignore the mandate they have received from Congress" (App. 74a).

[50] Instead, as we note below, the court saw such legislative events as a way of "formulating" the particular meaning it deemed to be "appropriate" for the arbitrary and capricious standard of review in the APA. App. 26a, 32a. It applied extraordinary scrutiny to that standard in this case "[b]ased on the legislative reaction to the passive restraint standard discussed above." App. 46a.

the scope of any such standard NHTSA might adopt, and —more importantly—to overturn the agency's action permitting compliance with either an active or passive requirement by means of an ignition interlock.[51] A contemporaneous resolution introduced by Senator Magnuson that sought to express "the sense of the Senate" that NHTSA should require passive restraints "as soon as practicable" never even reached the floor. S. Res. 398, 93d Cong., 2d Sess. (1974).

It is true that Congressman Wyman offered an amendment banning mandatory passive restraints which passed the House by a 339-49 margin,[52] but did not find its way into the Senate bill. The failure of the Wyman amendment to become law hardly suggests that either the Senate or the Congress decided to mandate passive restraints. The more plausible hypothesis is that the Senate preferred to leave this open and controversial question to the expert discretion of the agency.[53] This was entirely consistent with the Safety Act policy of not legislating particular safety standards but leaving the subject matter and content of each standard to the agency's informed discretion.

The tabling of 1977 legislative veto resolutions. The court of appeals also divined a legislative "mandate" for passive restraints from the tabling of legislative veto

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[51] *See, e.g.*, 120 Cong. Rec. 11789, 11969, 16326, 18221, 27990-91 (1974).

[52] 120 Cong. Rec. 27822 (1974).

[53] *See, e.g.*, 120 Cong. Rec. 30558 (1974) (Senator Hartke) (urging Senate "not to get into the business of setting standards by statute as the House has done without careful deliberation"); *id.* at 30838 (Senator Buckley) ("Congress should not place itself in the position of writing safety standards with respect to air bags"). Rep. Wyman himself endorsed the conference deletion of his amendment by noting that "[w]e do not know what lies ahead in the field of passive restraints" and that it "has not yet been determined" whether airbags "ought not to be made mandatory equipment." 120 Cong. Rec. 35637 (1974).

resolutions in 1977. But this reading is flatly inconsistent with the veto provision of the 1974 amendments, which specifically provides that it "shall not impair any right which any person may have to obtain judicial review" of Standard 208. 15 U.S.C. § 1410b(e).[54] Congress may elect for any one of a number of reasons not to disapprove an agency regulation. Possible reasons include disinterest, preoccupation with other matters,[55] reluctance or inability to act within the short time limit required by the veto provision, and legislative deference to the agency.[56]

The 1980 reauthorization bill. Although this bill was not enacted, the court of appeals nevertheless attached great significance to the fact that during its consideration "a majority of each house indicated support for the concept of mandatory passive restraints, and a majority of each house supported the unprecedented attempt to require some installation of airbags." App. 46a. This analysis is a perfect illustration of the dangers of dis-

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[54] Of course, these petitioners did not seek judicial review of the 1977 changes in Standard 208. But the purpose of provisions like Section 1410b(e) is to prevent precisely the kind of negative inference arising from failure to disapprove drawn in this case by the court of appeals. *See, e.g.*, 15 U.S.C. § 57a-1(d) (inaction or disapproval on veto resolutions for FTC rules "shall not be construed as an expression of approval" and "shall not be construed to create any presumption of validity").

[55] As one opponent of the rule conceded, "I agree that this particular issue pales in comparison with some of the more weighty matters which must be addressed by this Congress." 123 Cong. Rec. 31010 (1977) (Rep. Kasten).

[56] Chairman Eckhardt specifically noted during the House hearings on the veto resolutions that "If Congress did not overturn this rule, DOT would be under no limitation from retreating from their position, altering it, moving in other directions, et cetera." *Installation of Passive Restraints in Automobiles: Hearings on H.R. 1019 and H. Con. Res. 273 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate & Foreign Commerce*, 95th Cong., 1st Sess. 56 (1977).

cerning statutory "mandates" from floor action on unenacted bills that contain compromises on a wide variety of legislative policy issues.

An overwhelming majority (320 to 73) of the House also "indicated" support for a specific proposal to *ban* mandatory passive restraints when the House approved the Stockman amendment, which would have done just that.[57] The floor debate indicates that the conference report deleting the Stockman amendment and requiring airbags in a few car lines was simply a classic legislative tradeoff (in exchange for a statutory modification of NHTSA's standard for bumper protection) that cannot be read as a congressional mandate for passive restraints.[58] *See* 126 Cong. Rec. H 10197, H 10199 (daily ed. October 1, 1980).[59] Many bitterly opposed the conference bill, and in the end successfully advocated its defeat, because it "totally abandons the House position taken year after year on the airbag." 126 Cong. Rec. H 10198 (daily ed. October 1, 1980).[60]

As is self-evident from the House votes in 1974 and again in 1979 not to require mandatory passive restraints, as well as the other events described above, the asserted congressional "mandate" for passive restraints is con-

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[57] *See* 125 Cong. Rec. H 12285, H 12287 (daily ed. December 19, 1979).

[58] The conferees had reduced from 5 mph to 2.5 mph the speed at which car bumpers would be tested. H.R. Conf. Rep. No. 1371, 96th Cong., 2d Sess. 2, 13 (1980).

[59] Rep. Dingell's position indicates the compromise nature of the report: "While I object to the occupant restraint systems section . . ., I am not urging my colleagues in the House to vote to defeat the report." 126 Cong. Rec. H 10203 (daily ed. October 1, 1980).

[60] In fact, the subsequent Dingell-Broyhill bill—which also garnered a simple majority—was introduced with a statement clarifying that nothing in that proposal or in the Safety Act prevented NHTSA from revoking Standard 208 pursuant to 15 U.S.C. § 1392. 126 Cong. Rec. H 12119 (daily ed. December 5, 1980).

tradicted by other events showing equal congressional hostility to passive restraints. It also ignores that in the end Congress passed no statute altering the agency's discretion under the Safety Act to resolve the issue one way or the other. No significant meaning can be deduced from any of these "congressional reaction[s]," none of which ever was enacted as law.

B. The Court's Improper Use of These Post-Enactment Events Converts the "Arbitrary and Capricious" Test into a Judicial License To Stifle Regulatory Action It Does Not Like and To Usurp the Legislative Discretion Committed to the Agencies.

Reliance on any of the foregoing post-enactment activities would be a highly questionable way of ascertaining the meaning of even the Safety Act itself. As the court of appeals recognized, "[n]one of these acts carries the weight of positive law." App. 46.[61] Indeed, in this case the court ignored the congressional hostility to passive restraints actually registered as "positive law" in the form of 1978 and 1979 amendments to NHTSA appropriation bills.[62]

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[61] Even the legislative history of subsequent *statutes* carries little if any weight in ascertaining the meaning of earlier statutes. *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 & n.13 (1980). Post-enactment oversight activities are even less reliable for that purpose. *See TVA v. Hill*, 437 U.S. 153, 189-91 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *cf. North Haven Bd. of Ed. v. Bell*, 102 S. Ct. 1912, 1923-25 (1982) (failure of veto resolutions may help to "confi[m]" statutory language and legislative history supporting authority to issue regulation, where statutory veto provision provided for veto only upon a congressional finding that regulation was "inconsistent with the Act").

[62] These amendments prohibited use of fiscal year 1979 and 1980 funds to implement a passive restraint requirement. *See* App. 11a, 38a. Although the court correctly observed that these amendments had no practical effect beyond fiscal year 1980, they were enacted as

Of course, subsequent congressional failure to change the way in which an agency has consistently construed its statutory authority may in certain cases be interpreted as confirming the agency's construction. *Haig v. Agee*, 453 U.S. 280, 291-300 (1981); *United States v. Rutherford*, 442 U.S. 544, 554 (1979). But that principle cuts against, not in favor of, the conclusion reached by the court below. In this case, the agency historically has construed its governing statute as conferring discretion either to issue or not to issue some form of passive restraint requirement.[63] The failure of Congress to change that interpretation is far more significant than what Congress did or did not do or come "close" (App. 32a) to doing each time the agency exercised its conceded discretion one way or the other.[64]

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a "first step to send a message" to the agency. 124 Cong. Rec. 17187 (1978). *See also id.* at 17197. And the leading proponents of passive restraints in the House opposed the amendments precisely because they recognized that the amendments were intended "to set a precedent," 125 Cong. Rec. E 4733 (daily ed. September 25, 1979) —a precedent that might well have been followed in fiscal year 1981 had NHTSA itself not concluded that a review of its 1977 rule was appropriate.

[63] As Secretary Coleman noted in his 1976 decision, "In the end, a policy choice must be made between active and passive restraints." R. 2101. *See Motor Vehicle Information and Cost Savings Act Oversight: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 63-68 (1975) (Administrator Gregory). *See also Chrysler Corp. v. DOT, supra*, 472 F.2d at 675.

[64] The cases cited by the court of appeals for the somewhat enigmatic proposition that "an agency is not a legislature" (App. 31a & n.19) make precisely the opposite point, as does this Court's decision in *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86 (1935). Like Chief Justice Burger's concurrence in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 663 (1980), these cases hold that when an agency is executing delegated legislative authority judicial scrutiny of administrative action must necessarily be narrow.

The error of the court of appeals, however, was much more fundamental than this. The court proceeded to use legislative events and non-events, not as aids to statutory interpretation, but to "formulate" a wholly new standard of "arbitrary and capricious" review under the APA. This unprecedented use of such materials to alter the traditional scope and plain meaning of "arbitrary and capricious" review was nothing short of an exercise in "substitut[ing the court's] judgment" for that of the agency delegated authority to resolve these essentially legislative questions. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).[65]

C. The Court Failed To Apply the Narrow, Highly Deferential Scope of Review Which Is Proper in This Case.

As we have already shown, even if one applies to NHTSA's rescission order the scope of review normally applied to an agency decision promulgating a new regulation, the agency order falls well within the scope of permissible agency discretion. But that usual scope of review is itself excessively broad here because it ignores

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[65] The formless nature of this inquiry is well illustrated by the court of appeals' approach in this case. The court asserted that Standard 208 "has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." App. 32a. As noted above, that assertion is simply unsupportable. But how "close" must Congress come in order to trigger greater judicial review under the "arbitrary and capricious" test? The court further warned that NHTSA "cannot suggest that the congressional actions and failures to act described above have no bearing on the agency's freedom to regulate." App. 47a. But if they have any bearing at all, how much bearing do they have? The court's opinion suggests no answers to these questions.

the nature of the agency action on review—a rescission of a regulation substantially before its effective date. Under these circumstances, a narrow, highly deferential scope of review is proper.

NHTSA's October 29, 1981 order rescinded the passive restraint requirement twenty-two months before the effective date for small cars and ten months before the effective date for other cars. This is the first case of which we are aware where a court has been called upon to review a rescission of a rule before its effective date. *See* App. 25a. Petitioners submit that the decision here not to let a rule become effective should be treated as analytically equivalent to a decision not to promulgate in the first instance. Such decisions are subject only to a narrow scope of judicial review. *E.g., Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1045-47, 1052-53 (D.C. Cir. 1979); *accord, WWHT, Inc. v. FCC*, 656 F.2d 807, 816-18 (D.C. Cir. 1981). *See also Dunlop v. Bachowski*, 421 U.S. 560 (1975).

The court of appeals rejected the idea that "rescission more resembles agency refusal to act than an agency decision to act" (App. 25a) on the ground that the agency had "rescinded a rule that [was] already . . . promulgated." App. 26a. The court did not consider the crucial fact that the rule had not yet become effective and would not become effective for a substantial period of time. A rescission so far in advance of the effective date is very much like a decision not to promulgate in the first instance.[66] Because it failed to appreciate this point, the court of appeals applied an erroneously stringent scope of review to NHTSA's action.

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[66] *Cf. National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978) (upholding agency's refusal to adopt proposed standards).

III. THE COURT OF APPEALS IMPROPERLY INVADED THE PRIMARY JURISDICTION OF THE AGENCY TO DETERMINE THE MOST APPROPRIATE PROCEDURES FOR RESOLVING COMPLEX REGULATORY ISSUES.

The majority of the court advanced a second reason for invalidating the rescission order as arbitrary and capricious. They held NHTSA at fault for failing to evaluate a broad range of other regulatory options (ranging from warning lights to speed limiting devices) that in the majority's view should have been considered before making a decision to rescind. App. 54a-68a.[67]

The majority recognized that the agency had "explicitly considered," with an analysis that was "impressively thorough and careful," a "'wide range of possible changes'" to Standard 208. App. 54a-55a. But they held that an even more exhaustive study of regulatory options was necessary before any decision could be made in this particular proceeding. They assumed that the adoption of some form of passive restraint regulation was preferable to—and therefore precluded—rescission: "If NHTSA did not believe the standard as written would fulfill the standard's goals, its foremost obligation was to consider whether an amended standard could." App. 56a. The majority suggested a number of alternatives, strikingly like those which the agency had previously considered in earlier proceedings,[68] but had not

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[67] As noted above, Judge Edwards did not accept the failure to consider these alternatives as a basis for the ruling in this case. App. 75a.

[68] In 1969, the agency initiated the passive restraint rulemaking with a view toward adopting a mandatory airbag standard, but it soon decided to encourage experimentation and innovation in the development of passive restraint systems that could satisfy performance criteria as effectively as airbags. *See* pages 5-6 *supra*. In 1970, the agency proposed a safety standard for speed controls that would have required the horn to operate continuously between 81-85 mph, banned speedometer readings beyond 85 mph, and lim-

proposed or even mentioned in its April 1981 notice, and were therefore not discussed to any significant extent in comments on that notice.[69] The majority insisted that the agency had to reanalyze these options in the course of this proceeding before it could rescind the passive restraint requirement. By doing so, the majority ignored this Court's directive against " 'dictating to the agency the methods, procedures, and time dimensions of the needed inquiry.' " *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544-45 (1978).

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ited speeds to 95 mph. 35 Fed. Reg. 18295 (December 1, 1970). Following receipt of extensive comments, the agency "determined that the practicability of [this] system has not been sufficiently established." 39 Fed. Reg. 6765 (February 22, 1974). In 1974, NHTSA dropped a proposal that passive belt systems be nondetachable after the proposal triggered an almost universal negative reaction because of the possibility that nondetachable belts would inhibit passenger egress in emergency situations. *See* page 44 & n. 84 *infra*. In 1974, NHTSA also rejected proposals by Chrysler and others to replace ignition interlocks with warning systems that would have included a warning light that operates continuously until belts are fastened. *See* 39 Fed. Reg. 42692 (December 6, 1974). *See also* 41 Fed. Reg. 54961 (December 16, 1976); 44 Fed. Reg. 77210, 77217 (December 31, 1979); *cf.* 49 C.F.R. § 571.208 (S 4.5.3.3) (1981) (continuous lights required for passive belts). In 1977, the agency entered into agreements with certain automobile manufacturers to equip approximately 500,000 cars with airbags or passive belts as a demonstration project, but abrogated that plan several months later. *See* pages 7-8 *supra*.

[69] There is substantial question whether the agency could have adopted an alternative not proposed in the April 1981 notice. *See* 5 U.S.C. § 553; *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978); *American Frozen Food Inst. v. Train*, 539 F.2d 107, 135 (D.C. Cir. 1976). *See also Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972) (NHTSA notice proposing amendment of standard regarding turn signal and hazard warning flashers was inadequate where it did not mention the omission of sampling procedures).

A. The Safety Act Permits NHTSA To Rescind Its Passive Restraint Requirements Without First Considering a Variety of Complex "Alternatives" That Were Neither Ripe for Consideration Nor Foreclosed by the Rescission.

Contrary to the majority's suggestion, nothing in the Safety Act suggests that before issuing, amending, or revoking a passenger car standard, the agency must explore every significant alternative regulatory scheme.[70] The majority suggests that Congress would have viewed detachable passive belts as unacceptable (*see* App. 57a-58a, 60a), or would have legislated the "obvious alternative" of an airbags-only standard (*see* App. 63a-64a),[71] or would have preferred a Coleman-type demonstration program (*see* App. 68a). But these hypotheses are wholly speculative, since Congress never legislated on any of these questions. Even if such speculations were

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[70] There is a marked difference between the Safety Act and many other agency enabling statutes. *See, e.g.*, 15 U.S.C. § 2058(c) (requiring CPSC to publish text of proposed rule "including any alternatives" and a preliminary regulatory analysis with a designation of "any reasonable alternatives"); 49 U.S.C. § 1653(f) (prohibiting DOT from using parkland unless there is no "feasible and prudent alternative" to use of such land). In any event, NHTSA's April 1981 notice did propose three alternatives.

[71] The majority simply assumed that "airbags seem to have none of the problems that NHTSA identified in passive seatbelts" and that "the benefits of an airbags-only standard would be significantly greater than the minimal benefits now predicted from Modified Standard 208 as written." App. 64a-65a. Yet even the existing record abounds with references to the difficulties that an airbag-only standard would raise, including questions about the installation of airbags in small cars (R. 2094), the requirement of lap belts to ensure equivalent overall protection in airbag cars (R. 402, 1259), the possible adverse public reaction to mandatory airbags (R. 396, 398, 2123), and their uncertain supply on a wide-scale basis (R. 1475-76). There is also serious question whether an airbags-only standard would violate the Act's requirement of "objective" performance standards, rather than design standards. 15 U.S.C. § 1392(a).

correct, they would be irrelevant to whether the agency's action was beyond its discretion under the Safety Act or "arbitrary and capricious" under 5 U.S.C. § 706 (2) (A).

Agencies performing an essentially legislative function often proceed on a step-by-step basis,[72] and they are generally free to determine when they will address particular regulatory issues.[73] Courts have rarely disturbed agency decisions to pursue an issue or a particular alternative program, at a given time; [74] courts have intervened only when the agency has acted in a manner inconsistent with its statutory mandate.[75] Even where a statute ex-

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[72] *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (legislative ban on plastic nonrefillable milk containers); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935) (legislative restriction on advertising by dentists but not other professional groups).

[73] *E.g., Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1055-56 (D.C. Cir. 1979); *REA Express, Inc. v. United States*, 568 F.2d 940, 950 (2d Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *cf. Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (FTC discretion over enforcement decisions).

[74] *See, e.g., Southland Mower Co. v. CPSC*, 619 F.2d 499, 517 n.37 (5th Cir. 1980) (rejecting "claim that the CPSC has a broad obligation to research and develop all possible safety measures" and holding that it "may, within reason, exercise its discretion in allocating agency resources to various projects"). *See also WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981) (refusing to disturb agency decision not to initiate rulemaking proceeding); *National Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978) (upholding agency's refusal to adopt proposed standards).

[75] In the few relevant decisions cited by the court to justify its holding (App. 56a, 69a), the applicable statute—unlike the Safety Act—imposed on the agency an explicit or implicit obligation to analyze alternatives to proposed agency action. For example, in *Pillai v. CAB*, 485 F.2d 1018 (D.C. Cir. 1973), the CAB had failed to recognize that Congress had specifically conferred upon it the power to suspend foreign tariffs and to engage in bilateral negotiations as an alternative to open rates. In *Scenic Hudson Preserva-*

pressly requires the evaluation of alternatives to proposed action, this Court has warned that such a requirement "must be bounded by some notion of feasibility":

> "Common sense also teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Vermont Yankee*, *supra*, 435 U.S. at 551.

These principles apply with special force in the context of the Safety Act. From time to time, as NHTSA has gained more knowledge about the predictable effects of various elements of the proposed passive restraint rule, it has modified Standard 208 or postponed its effective date to reflect changed conditions. *See Chrysler*, *supra*, 472 F.2d at 680.[76] On none of these occasions did it consider every possible alternative before modifying the standard or postponing its effective date. The effect of a rule requiring it to do so would create regulatory paralysis.

Nor was it appropriate for the court to characterize its ideas for other regulatory schemes as "alternatives" that must be considered before rescinding the existing rule. The rescission order and the options suggested by the court are in no sense mutually exclusive—as, for example, is true of competing applications for construc-

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tion Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), the FPC was obligated to consider alternatives to a proposed hydroelectric project because the Federal Power Act required that the project be "best adapted" to improving the waterways. In *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the agency had "artificially narrowed the scope of the regulatory problem" by failing to ask whether the challenged rules would achieve the statutory objectives. Such an inquiry was precisely what NHTSA undertook in this case.

[76] At the time of the *Chrysler* decision, the passive restraint concept had generated over 20 agency notices, including proposals and final orders. *See* 472 F.2d at 664-67. By the time of the 1981 rescission order, that number had grown to approximately 60. App. 4a.

tion permits,[77] or alternative sites for housing projects.[78] Like Secretary Coleman in 1976, NHTSA specifically noted that its decision here "does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize" after its public education program. App. 115a. Until and unless it does foreclose such options, NHTSA cannot practicably be required to assess their relative merits.[79] NHTSA's decision that the uncertain benefits of the passive restraint requirements "in their present form" do not warrant their continuation now (App. 104a) does not preclude the agency from studying and adopting other regulatory programs thereafter, including those the court majority suggested. Whether or not NHTSA hereafter exercises its discretion to adopt one or more of those "alternative" policies, there was no basis for the court to mandate that the passive restraint requirement be restored in the meantime. Under the Safety Act and the APA, that decision lies within the agency's informed discretion. *See Burlington Northern, Inc. v. United States*, 51 U.S.L.W. 4029 (U.S. December 13, 1982).

B. NHTSA's Reasons for Deciding Not To Prohibit Detachable Belt Systems at the Present Time Were Amply Supported in the Record.

Although it was not obligated to do so, NHTSA expressly considered and rejected one of the options proposed by the court that had not been mentioned in the April 1981 notice—to require compliance with Modified Standard 208 by means other than detachable passive

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[77] *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945).

[78] *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam).

[79] *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 398-402 (1976) (environmental impact statement under NEPA not required before agency actually proposes "major Federal action" affecting the area).

belt systems. App. 109a-110a. The majority found the agency's explanation for this decision "hollow." App. 56a. In so holding, the majority ignored the agency's interpretation of the record and substituted its own regulatory judgment for that of the agency.[80]

The majority concluded that the "decision not to amend the standard so as to allow only continuous passive belts is . . . fundamentally flawed by NHTSA's failure to consider that the standard might only permit use of such belts in the first place." App. 58a. The only support offered for this remarkable proposition is a series of selected remarks by members of Congress, from which the majority concluded that detachable passive belts may not, in fact, be "passive restraints."[81] Yet what Standard 208 may or may not "permit" was not prescribed by Congress, but by the agency. "Passive restraint" is not a statutory term, but a term contained in Standard 208 itself, and NHTSA as the author of the standard is the best judge of what types of restraint systems comply with the words it wrote.[82] And the history of Standard 208 demonstrates a continuing agency commitment to detachability for precisely the reasons of emergency egress and public acceptability identified by NHTSA in this case.

After the issuance of original Standard 208 the agency proposed and then adopted for active safety belts a requirement for a pushbutton release mechanism, not-

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[80] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1972).

[81] Once again, the court simply ignored statements of other members of Congress that detachable belts *do* satisfy NHTSA's standard. The 1980 conference report discussed by the court would have required that passive belts "be detach[able] at any point, including one adjacent to the inboard anchor." H.R. Conf. Rep. No. 1371, 96th Cong., 2d Sess. 17 (1980). *See* App. 41a-42a.

[82] An agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

ing that "standardization of release systems is important for safety" [83]—"particularly in emergency situations." 36 Fed. Reg. 4600, 4601, 4605 (March 10, 1971). When the agency first established requirements for an emergency release device for passive belts in 1974, it provided for a similar mechanism. Based on earlier comments,[84] the agency "agree[d] that post-crash egress and avoidance of possible entrapment are important restraint system considerations." 39 Fed. Reg. 3834 (January 30, 1974). After receiving further comments—all but one of which favored such a manual release [85]—NHTSA again mandated such a device, concluding that its advantages "outweigh the disadvantages of possible abuse." And it again required "push-button action for all belt systems so that persons familiar with any belt system in any vehicle can operate the belt system of an unfamiliar vehicle." 39 Fed. Reg. 14593, 14594 (April 25, 1974).

In short, the agency's uniform policy since it first adopted Standard 208 has been to permit detachable push-button belts as a way of ensuring emergency egress.[86] That policy was once again endorsed by tes-

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[83] 35 Fed. Reg. 14941, 14942 (September 25, 1970). *See also* 35 Fed. Reg. 16927, 16931 (November 3, 1970).

[84] The agency's initial proposal for a release mechanism for passive belts would have prohibited "belt separation" and required "that the system be self-restoring after operation of the release." 36 Fed. Reg. 12866 (July 8, 1971). The comments on that proposal emphasized almost unanimously the importance of ensuring ease of emergency egress and the risks of impeded egress if belt separation were prohibited, and they recommended a push-button release mechanism similar to that already required for active belts. *See* R. 2363-64, 2370-79, 2485-96. NHTSA never adopted its 1971 proposal.

[85] 39 Fed. Reg. 14593 (April 25, 1974). *See, e.g.*, R. 2324.

[86] In 1978, NHTSA modified the passive restraint provisions to permit (though not to require) manufacturers of passive belts to develop a release mechanism that would "play out" in an emergency, as opposed to the conventional pushbutton release required since 1974. 43 Fed. Reg. 52493 (November 13, 1978). This amendment was the result of a petition by General Motors to permit the

timony in this proceeding.[87] When it dismissed the agency's judgment not to depart from that well-supported policy in this proceeding as "hollow," the majority substituted its own regulatory judgment on this question for that of the agency. And its dismissal of public hostility to nondetachable belts simply because that hostility might be founded in an "irrational" fear of entrapment (App. 23a, 60a) ignores the agency's duty under the Safety Act to consider the public acceptability of its safety standards. *Pacific Legal Foundation, supra,* 593 F.2d at 1345.[88]

IV. THE COURT IMPERMISSIBLY INVADED THE PRIMARY JURISDICTION OF NHTSA TO SET THE EFFECTIVE DATES OF AMENDED STANDARD 208 PENDING FURTHER AGENCY RULEMAKING PROCEEDINGS.

When it reversed the agency's rescission order on June 1, the court of appeals expressly "decline[d] the suggestions" of respondents here that it order Modified Standard 208 to take effect by September 1982 or September 1983. App. 72a. The court also noted that its

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use of "spool release" belts as an experimental program that "could provide some needed insight into the questions of acceptance by seatbelt *users* of a specific design." R. 2561 (emphasis in original). Based on the almost complete lack of acceptance of that design by the public, GM discontinued such coercive passive belts and planned to install detachable belts instead had the passive restraint requirement been in effect. R. 1433.

[87] The President of the American Seatbelt Council testified, for example, that "practically I realize you have to have detachability for those [*sic*] small group of people that are going to object no matter what," and that "detachability is one of the facts of life we must have in automatic systems in order to get the maximum usage to a major number of people." Tr. of NHTSA Public Hearing, August 5, 1981, at 159-60.

[88] The agency's finding of a widespread fear of entrapment by seatbelts is well supported by the record. R. 1651, 1660-61, 1703, 1978, 2260. Such fears may actually result in physical destruction or elimination of passive belts by motorists. R. 233-34. *See also* Tr. of NHTSA Public Hearing, August 5, 1981, at 160-61.

decision did not foreclose subsequent rescission or suspension of the passive restraint requirements by NHTSA for valid reasons. App. 54a, 72a, 74a. In its August 4 order, however, the court abruptly changed course. It acknowledged that NHTSA's July 1 schedule for further action was "not inconsistent" with its June 1 order (App. 82a), but it nevertheless reinstated the passive restraint requirement, invoking its "equity powers" to extend the effective date to September 1, 1983 for large and mid-sized cars. Although the court requested the agency to advise the court no later than October 1, 1982, whether such a compliance date was "achievable," [89] it made clear that "[t]he reporting date of October 1, 1982, does not affect the requirement that automobile makers comply with the standard by September 1, 1983." App. 81a-82a.

The August 4 order unlawfully invaded the primary jurisdiction of the agency to determine in the first instance whether, when, and in what form passive restraint requirements should be adopted, and what procedures should be used to resolve these issues. The "guiding principle" for judicial review of administrative decisions is that "the function of the reviewing court ends when an error of law is laid bare." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). The Court cautioned in *Vermont Yankee*:

> "'At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to

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[89] App. 80a, 81a. The applicable statutory criterion—practicability—calls for a considerably different policy judgment by the agency. *See* 15 U.S.C. §§ 1391(2), 1392(a). As the committee reports explained, this judgment requires "consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966); *see also* S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966).

> be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." '" 435 U.S. at 544-45, *quoting FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976).[90]

Here, however, the court of appeals not only dictated the "methods, procedures, and time dimension" of the inquiry by NHTSA. It then proceeded to preempt that entire inquiry by reimposing the effective dates of the standard and, in effect, giving the agency one last shot at convincing the court it was wrong. This Court has held on numerous occasions that courts of appeals must not assume the rulemaking functions delegated to agencies by Congress. *E.g., Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 817-26 (1973); *Burlington Northern, Inc. v. United States*, 51 U.S.L.W. 4029 (U.S. December 13, 1982). Federal courts may neither reinstate regulations that were unlawfully modified[91] nor order other relief that usurps administrative powers.[92] Here, the

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[90] In *Chrysler Corp., supra*, the Sixth Circuit followed these same principles when, after invalidating the compliance procedures of NHTSA's passive restraint requirement, it suspended that requirement "until a reasonable time [to be determined by the agency] after [new] test specifications are issued." 472 F.2d at 681.

[91] *E.g., Consolidated Rail Corp. v. National Ass'n of Recycling Indus., Inc.*, 449 U.S. 609, 612 (1981) (summary reversal); *Long Island R.R. v. Aberdeen & Rockfish R.R.*, 439 U.S. 1, 4-6 (1978) (summary reversal).

[92] *See Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092, 1101 (5th Cir. 1976) (order mandating immediate reinstitution of regulations revoked by USDA was a "total displacement . . . of the Secretary's function" not warranted by the district court's equity powers). *See also Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264, 1268-69 & n.7 (D.C. Cir. 1981) (giving effect to rescission of rule pending judicial review of rescission in court of appeals and this Court).

Safety Act expressly reserves to the agency both the discretion to determine effective dates of motor vehicle safety standards,[93] and the authority to review and decide the significance of any new evidence brought to the attention of a reviewing court. 15 U.S.C. § 1394(a)(2).[94] It was improper for the court of appeals to commandeer the complex process of agency fact-finding and rulemaking and to usurp the agency's authority to resolve such issues in the first instance.[95]

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[93] 15 U.S.C. § 1392(c). This discretion was intended to allow the agency to consider economic and engineering factors that may make effectiveness of a new standard within one year undesirable. S. Rep. No. 1301, 89th Cong., 2d Sess. 7 (1966).

[94] This provision is derived from a similar provision of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(f)(2). *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 20 (1966). The legislative history of that provision makes clear that, if additional evidence must be taken, the court of appeals may not consider such evidence in the first instance. *Compare* H.R. Rep. No. 2139, 75th Cong., 3d Sess. 10-12 (1938), *with* H.R. Conf. Rep. No. 2716, 75th Cong., 3d Sess. 25 (1938).

[95] The problems that inevitably result when a court of appeals arrogates unto itself the role of administrative expert became painfully clear when the court here ordered the parties to submit additional evidence as to whether the September 1, 1983 effective date it mandated in its August 4 order was "achievable." NHTSA contended that compliance could practicably be achieved by "September 1, 1985 at the earliest." MVMA Br. App. 44. Respondents here opposed this view on the basis of a "leaked" agency staff document purporting to contradict the agency's submission. *Id.* at 68. A supplemental submission by NHTSA showed that there were substantial errors in the staff document, that it conflicted with yet another staff document, and that in any event the analysis in that document was consistent with the agency's conclusions. *Id.* at 115-16.

CONCLUSION

For the reasons stated above, the judgment and orders of the court of appeals should be reversed and NHTSA's order rescinding the prospective passive restraint requirements of Standard 208 should be upheld.

Respectfully submitted,

Of Counsel:

WILLIAM H. CRABTREE
Vice President and
General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers
Association of the
United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and
General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
TERRENCE J. LEAHY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

MILTON D. ANDREWS
DONALD M. SCHWENTKER
LANCE E. TUNICK
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner Automobile Importers of America, Inc.

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

December 23, 1982

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CLERK

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO BRIEF OF PETITIONERS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, CHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.

[Counsel Listed on Inside Cover]

December 23, 1982

Of Counsel:

WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK*
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
TERRENCE J. LEAHY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

MILTON D. ANDREWS
DONALD M. SCHWENTKER
LANCE E. TUNICK
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007

Counsel for Petitioner Automobile Importers of America, Inc.

**Counsel of Record*

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et. al.*,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents.

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,

Respondent.

BRIEF FOR INTERVENORS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.

Filed in Final Form
February 12, 1982

* * * *

AFFIDAVIT OF J. D. WITHROW
VICE PRESIDENT—ENGINEERING
CHRYSLER CORPORATION

J.D. Withrow, being duly sworn, states:

1. I am Vice President—Engineering for Chrysler Corporation. In that capacity I am in charge of all engineering design and development work for Chrysler. I have 25 years experience in the engineering and product planning activities of Chrysler. From that experience and from the requirements of my present position, I am thoroughly familiar with the lead time requirements for the design, development and manufacture of automobile components and automobiles.

2. I have been informed by Chrysler's General Attorney's Office that State Farm Mutual Automobile Insurance Co., the National Association of Independent Insurers and certain other parties are challenging the October 23, 1981 order of the National Highway Traffic Safety Administration rescinding the passive restraint requirements of FMVSS 208 and seeking to have those requirements reinstated. At issue are requirements that automatic seat belts or other passive restraints be installed on large and medium sized vehicles for the 1983 model year and on all other vehicles for the 1984 model year. I am further informed that this court has requested that we advise them of the time that would be required by vehicle manufacturers to take appropriate action if the court were to invalidate NHTSA's rescission order.

3. While Chrysler was energetically pursuing the development of automatic seat belt systems prior to NHTSA's rescission of the passive restraint requirements of FMVSS 208, its program for 1983 model requirements was only about half completed and its program for 1984 model requirements had just begun. Completing development of automatic seat belt systems meeting the requirements rescinded by NHTSA would be a complex, time-consuming process involving major

tear up and redesign of several major vehicle assemblies including both front doors, roof structure, instrument panel, interior trim, front seats and the seat belt assembly itself for all passenger cars built by Chrysler Corporation. For example, doors must be redesigned to permit the mounting of the seat belt retractor assemblies with sufficient reinforcing structure to withstand the high loads imposed on the system in vehicle crashes. In addition, a mechanism must be provided in the door to deactivate the inertial locking mechanism of the retractor when the door is opened so that the door will function properly and a mechanism must be developed to provide a shoulder harness turning loop to facilitate occupant entry or exit. In the system Chrysler had under development, the door arm rest or trim panel must be redesigned to house the retractor and related components. Indeed, as a practical matter, the internal structure and interior surface of all front doors must be substantially modified and essentially retooled. In essence, existing components must be thrown away and new ones developed and tooled. When these tasks are completed a multitude of trim and other parts must be designed and developed before a commercially acceptable door assembly is ready for production. The same type of situation exists for most other components affected by the passive belt system. Exhibit A is attached illustrating the types of parts that must be developed or redesigned for passive belts.

4. Installation of passive belts is further complicated by the fact that Chrysler has never built vehicles equipped with passive belt systems. Some of Chrysler's competitors have offered automatic seat belt systems on a very limited number of vehicles; those systems, however, are of a totally different design than that contemplated for Chrysler vehicles. This means that there is no automatic seat belt hardware presently designed or in production which can be incorporated into Chrysler vehicles. Even if such hardware were available, existing Chrysler vehicles have no provision for passive belts and major component assemblies such as doors, seats and instrument panels will have to be modified to accommodate passive

belt hardware. It is much simpler from a lead time standpoint to adapt existing hardware to vehicles which already contain provision for incorporating such hardware. Since neither the hardware nor the provision for incorporating the hardware exists in Chrysler vehicles, there is no means of significantly compressing necessary lead time requirements. I would also point out that the existence of manual seat belt hardware and a provision for installation of that hardware enabled some manufacturers to continue to use manual belts on some vehicles after NHTSA's April order delaying passive belt installation for certain vehicles until the 1983 model year.

5. Once automatic seat belt systems complying with the requirements of FMVSS 208 are designed, additional time is required to obtain tooling necessary to produce the required hardware and vehicle components, and to develop the necessary production processes for use in manufacturing automatic belt components and incorporating them into vehicles at our assembly plants. When the system is designed and production capability established the production methods to be used must be tested to assure that the systems can be efficiently produced. Finally, the completed production prototypes must be tested to establish compliance.

6. Over two years lead time is required to design, develop and incorporate into existing vehicles automatic seat belt systems of the type we were working on prior to October 29, 1981. Attached as Exhibit B are a series of charts demonstrating the lead time requirements for passive belt hardware originally developed several months ago for a 1984 model passive belt program.

7. I conclude that we cannot offer any 1983 model vehicles and cannot offer most 1984 model vehicles equipped with automatic seat belt systems. Applying the information set forth in Exhibit B to the current situation, our lead time requirements may be summarized as follows:

(a) *Vehicles with over a 100 inch wheel base.* Development of an automatic belt system for our so-called E Body

vehicles had progressed the farthest when NHTSA issued its October 23, 1981 order because FMVSS 208 originally required that these vehicles comply by September 1, 1982 (1983 model year). If the passive belt requirements of FMVSS 208 were reinstated by June 6, 1982, we would be able to incorporate such a system to 1984 model E Body vehicles.

(b) *All other existing vehicles.* When NHTSA issued its October 23, 1981 order rescinding the passive restraint requirements, work on automatic belt systems for all other vehicles was at an early stage since compliance for these vehicles was not required until September 1, 1983 (1984 model year). As of October 23, 1981 this program was 7 weeks behind schedule. If the requirement for automatic seat belts was reinstated after a delay of several months it would now take at least 12 weeks to acquire and where possible reassemble the people necessary to design and develop automatic seat belts and reinstitute our program. As a result, over two years lead time (112 weeks) would be required to incorporate such systems on these vehicles. This means that if the passive restraint requirements were to be reinstated it would have to be done *no later* than June 6, 1982 in order for us to meet a September 1, 1984 effective date for existing vehicles other than E Body vehicles.

(c) *New vehicles.* Chrysler is developing a new model vehicle for model year 1985 called the H Body. Incorporating automatic belts into a new vehicle would pose further difficulties since it would disrupt the highly interrelated design process of a vehicle presently being designed for future production. In the case of a new vehicle configuration, such as the H Body, an additional 13 weeks of lead time would be required to install automatic belts on H body vehicles over that required to install such belts on existing vehicles. As to this new vehicle line the passive belt requirements would have to be reinstated *no later than March 7, 1982* to permit Chrysler to incorporate such belts on 1985 model H Body vehicles.

8. It is not practicable to shorten the lead time set forth above. Since 1978 Chrysler has reported almost $3.5 billion in losses and is currently operating under $1.2 billion in federally guaranteed loans. As a result we have been forced to cut back severely in all areas of the Corporation including Engineering. We simply do not have the manpower or monetary resources to devote to a crash development program attempting to compress lead time. Even if we had unlimited resources, the foregoing lead times could not be significantly compressed without substantially increasing the risks of inadequate system design, production error and customer dissatisfaction.

9. In my judgment, a mid-model year introduction of passive restraint systems would not be practicable. Such a mid-year introduction of a major new subsystem involving changes to a number of vehicle components including right and left front doors, roof structure, instrument panels, seats, belt assemblies and numerous pieces of color coordinated interior trim on virtually all vehicle configurations built by Chrysler would require us to have a complex second launch in the middle of a model run. Such a second launch undoubtedly will require plant shut-down for a substantial period of time to remove obsolete components from the plant, to modify tooling, to fill the assembly line with new unique components, to incorporate new manufacturing processes and to instruct assembly line workers in performing new operations. This process would be difficult and time-consuming for any change in vehicle hardware. The task involved here, where substantial change and coordination would be required in the middle of a model run to assure proper vehicle assembly and color coordination of numerous modified interior trim parts, would be nearly unprecedented. Frankly, we do not have the manpower or other resources to conduct such a second launch of this magnitude. Temporary plant shutdown required by a second launch would have a severe adverse impact on Chrysler, resulting in the loss of sales and substantial other economic losses. Such a temporary shutdown could threaten the continued viability of Chrysler.

10. The lead time requirements discussed above are based on the assumption that the passive restraint requirement would be reinstated without change except for the effective dates and that we would use the type of system we were developing prior to NHTSA's rescission of the passive restraint requirements. I understand the Petitioners to be arguing that any reinstatement should include a prohibition of detachable automatic belts. This would represent a major change for Chrysler since we had planned to use detachable automatic belts in all of our vehicles as permitted in the standard. Such a change would force us to start over on all passive belt systems. In my judgment, a requirement of non-detachable passive belts would add over one model year and possibly several model years to each of the lead time schedules discussed above since we would have to develop and design an entirely new system with which we have no experience even in Engineering. Such a program would require us to investigate, address and attempt to resolve a number of additional unresolved problems like the problem of emergency release. Some form of emergency release is necessary in the event of accident. Yet the type of non-detachable belt advocated by Petitioners likely would of necessity require an emergency release mechanism designed into the seat belt retractor. The location of such a mechanism in the door where it could be jammed in a side impact is not in the interest of vehicle safety. At the same time location of the mechanism on the inboard side of the seat would make it very difficult to rescue an injured driver or occupant from a vehicle following an accident. This again would not be in the interest of vehicle safety.

11. In my judgment, reinstatement of the passive belt requirements of FMVSS 208 without the lead time discussed above could result in Chrysler being forced to discontinue vehicle production for a significant period of time. Chrysler

would not be able to survive a severe production disruption of this type.

/s/ J. D. Withrow
J.D. WITHROW

Subscribed and Sworn Before me
this 22nd day of January, 1982.

/s/ Lena Zolin
LENA ZOLIN
Notary Public Wayne County, Mich.
My Commission Expires Feb. 1, 1982

EXHIBIT A

Listed below are the major systems which must be either developed or redesigned to incorporate a detachable belt system:

I DOOR SYSTEMS: For Each Front Door—

1) Door inside panel—large formation to mount two retractors
2) New inside door panel reinforcement
3) Upper door frame bracket with weld nut to mount upper torso belt turning loop
4) Upper door opening anchor plate with guide pin to transfer upper torso belt loads to the body
5) Attaching hardware: Five (5) bolts, three (3) nuts
6) Lower door bracket with weld nut to attach the lap belt turning loop

Two (2) door cars with frameless glass must have the following additional changes for each door:

1) Rework the door daylight opening to accept a structural door post for the turning loop
2) New upper turning loop carrier (post)
3) New post/body interlock system consisting of two (2) brackets, striker and attaching bolts

4) Reinforcement bracket welded to the door inside panel and door shut face to accept the door post

5) Attaching bolts—post to reinforcement

II DOOR AND BODY TRIM SYSTEMS

1) Door trim panel cut-out

2) New arm rest to accept large spool retractors

3) Additional attachments (screws)

4) Additional sound and vibration protection

5) Additional sealing modifications

6) Changes on the 'B' pillar trim

7) Changes on the quarter panel trim (2 doors)

8) Changes on the headliner panel

9) New body upper 'B' pillar cover to reinforcement

10) New anchor guide receptacle cover at the door frame corner

III SEATING SYSTEM

1) Relocate power seat control center from side of the seat to front

2) Modification to the control center mounting bracket

3) Modification to the seat side shields (with power seat)

4) Change seat contour by changing the seat cushion and cover

5) Bench seat model cars—fixed arm rest

IV INSTRUMENT PANEL SYSTEM

All vehicles will require substantial change. The following list based on the 1983 model ET-41 is given as an example:

1) Lexan base panel instead of A.B.S. tool revisions needed

2) VA type point mounting screws

3) Insulation, paint, or material changes for all parts with plastisizers that contact lexan-column boot, crash pad, wires and control cables

4) Revise lower reinforcement with four (4) added brackets, two (2) end braces and two (2) column area braces

5) Side cowl nut and screw changes (all K and G bodies)

6) New steering column cover. Two (2) approaches, a two piece lexan cover with a ramp shape to deflect knees outward during impact and 2 inch sheet metal and foam bolster that crushes under impact

7) Relocation of rear lamp switch and fog lamp switch

8) Revise silencer pad

9) Fuse block serviceability will be affected

10) Two (2) extra lower left trim bezels must be relased with attaching screws

11) Added panel part numbers—vendor and assembly plant complexity

V FRONT SEAT BELT SYSTEM (TWO PER VEHICLE)

1) New upper torso retractor with mechanical pawl blocker assembly; consists of the following sub-assemblies:

- Retractor shaft
- Large arbor and ratchet assembly
- Lock pawl, pin and bushings
- Pendulum and pendulum support assembly
- Mechanical blocker lever assembly
- Lever return spring
- Webbing return spring
- Tension reliever assembly

2) New lap belt retractor with mechanical pawl bracket assembly consists of the following sub-assemblies:

- Retractor shaft

- Arbor and ratchet assembly
- Lock pawl, pin and bushings
- Pendulum and pendulum support assembly
- Mechanical pendulum blocker lever assembly
- Mechanical lever return spring
- Webbing return spring

3) Upper turning loop (to attach to either door frame upper bracket or door post on 2 door with frameless glass)

4) Lower turning loop (to attach at the lower rear corner of the door)

5) Seat belt latch plate

6) Seat belt buckle assembly

7) Retractors carrier bracket

* * * *

TOTAL 1984 MODEL YEAR L-24 AUTOMATIC SEAT BELT PROGRAM IN CHRONOLOGICAL ORDER EXTRACTED FROM THE NETWORK

NETWORK ACTIVITY NO.	SCHEDULED DATE COMMITMENTS		ACTIVITY TITLE	RESPONSIBILITY	ACTIVITY TIME IN WEEKS
500	6/ 1/81	A	BEGIN IMPACT DEVELOPMENT	S'BERGER	0.0
800A	6/16/81	A	START PRELIM L/O SWITCH	DUPREE	0.2
130	7/15/81	A	PRELIM L/O-ANCHOR & T'LOOP LOC	SHEA	0.0
500B	7/15/81	A	PRELIM SYSTEM DEFINED	S'BERGER	6.2
800	7/29/81	A	COMP PRELIM SWITCH L/O	DUPREE	6.0
130A	7/31/81	A	DR UPR + INR PNLS CONFIRM L/O	DYNES	2.4
501B	7/31/81	A	ANCHOR PROVE OUT	S'BERGER	2.4
180	8/ 3/81	A	HDWR COMPONENTS LAYOUTS N/R	SHEA	0.0
600	8/ 3/81	A	ENVIRONMENTAL LAYOUTS	SHEA	0.2
131	8/11/81	A	ENGRG MOCK-UP VEH	SHEA	3.8
820	8/18/81	A	COMP FINAL SWITCH L/O	DUPREE	2.8
IP1	9/15/81	A	START I'PNL D.O. THEMES	GALE	0.0
IP5	9/15/81	A	START I'PNL FEAS STUDIES	HOLTSLAG	0.0
500A	9/15/81	A	PRELIM I'PNL IMPACT REQRMTS	S'BERGER	14.8
501A	9/15/81	A	STRG COLUMN CONCEPTS	KIRBY	0.0
140 •	9/24/81		FEASIBILITY-INTERLCK CONCEPTS	DYNES	6.2
170	10/ 1/81		2 DIMENSIONAL TRIM CONCEPTS	GALE	1.0
840	10/13/81		REL PROG CAR SWITCH DESIGN	DUPREE	7.6
135	10/29/81		DESIGN OFFICE CONCEPTS COMP	GALE	4.0

NETWORK ACTIVITY NO.	SCHEDULED DATE COMMITMENTS	ACTIVITY TITLE	RESPONSIBILITY	ACTIVITY TIME IN WEEKS
400A	11/ 5/81	P.D.M. CONCEPT APPRV CORP. MANAGEMENT		1.0
400	11/12/81	3 DIM INT CONCEPT STUDIO REL	GALE	1.0
190	11/30/81	PRELIM L/O DOOR STRUCTURE	DYNES	3.2
610	12/ 2/81	H'WARE SAMPLES AVAIL-PROTOTYPE	SHEA	16.2
401	12/14/81	SURFACE DRWG POST FRT DR ANCHOR	J.LOVE	4.0
410	12/14/81	SURFACE DRWGS-COVERS-BRKT-T/LOOP	J.LOVE	3.0
420	12/14/81	SURFACE DRWGS-DR TRM PNL A'REST	J.LOVE	3.0
620	12/14/81	COMPLETE PROTOTYPE SAMPLE TESTS	SHEA	1.6
IP2	1/ 5/82	I'PNL D.O. THEMES HAND-OFF	GALE	14.2
IP3	1/ 5/82	D.O. PROVE-OUT COMPLETE	WRIGHT	14.2
IP4	1/ 5/82	SURFACE DRAWING RELEASE	J.LOVE	14.2
IP6	1/ 5/82	I'PNL FEAS STUDIES HAND-OFF	HOLTSLAG	14.2
200	1/ 6/82	IMPACT TEST & PROVE-OUT	S'BERGER	4.0
630	1/ 6/82	COMP PROG CAR H'WARE DESIGN L/O	SHEA	2.0
IP7	1/ 7/82	START I'PNL PROD DESIGN	KINCAID	0.4
430	2/ 3/82	COMP D.O. PROVE OUT STUDIES	WRIGHT	6.0
IP11	2/ 4/82	I'PNL DESIGN AID REL	HOLTSLAG	4.4
IP20	2/10/82	I'PNL P'TYPE IMPACT INFO REQ'D	S'BERGER	4.8
210	2/17/82	L/O REL-PROG CAR DOOR STRUCT	DYNES	6.0
440	2/17/82	SURFACE DRWG RELEASES	J.LOVE	2.0

NETWORK ACTIVITY NO.	SCHEDULED DATE COMMITMENTS	ACTIVITY TITLE	RESPONSIBILITY	ACTIVITY TIME IN WEEKS
601	2/17/82	FINAL ENVIRONMENTAL LAYOUT	SHEA	9.6
650	3/ 3/82	PROGRAM H'WARE SMPLS AVAIL	ERNSTER	8.0
660	3/31/82	COMP HARDWARE SAMPLE TESTS	SHEA	4.0
951	4/ 5/82	SOUND & ELECTRONIC	JENKINS	0.0
IP21	4/12/82	COMP I'PNL P'TYPE IMPACT DEV	S'BERGER	8.4
850	4/13/82	BEGIN PARTS TESTS	DUPREE	24.0
IP12	5/ 4/82	COMP I'PNL DESIGN AID	KOZICKI	12.4
211	5/11/82	IMPACT PROVEOUT-PROD DESIGN	S'BERGER	2.0
IP8	5/27/82	I'PNL A.D.M.R. FOR DIE MODEL	KINCAID	0.0
113	5/27/82	I'PNL VALID'N CAR RELEASE	KINCAID	3.4
750	6/ 2/82	QTR TRM PNL L/O COMP	C.LOVE	8.0
710	6/ 4/82	FRT DOOR ARM REST L/O COMP	C.LOVE	15.0
860	6/ 7/82	COMP PARTS TESTS	DUPREE	7.6
213	6/ 9/82	TRIM PROVISIONS	C.LOVE	2.0
560	6/16/82	BIW L/O-RF RAIL FORM,8 POST,ETC	DOERR	16.6
310	6/24/82	VALID'N CAR DESIGN RELEASE	C.LOVE	0.0
214	7/ 2/82	FRT DR WIRING PROVISION L/O	CUNNINGHAM	4.0
IP13	7/12/82	COMP PROG I/P WRG DEV	CUNNINGHAM	4.0
870	7/12/82	COMP PROD PART DETAILS	DUPREE	4.8
670	7/13/82	COMP FINAL HARDWARE LAYOUT	SHEA	14.2
220	7/22/82	EMD RELEASE - DOOR STRUCTURE	DYNES	2.6
IP14	7/26/82	REL PROG I/P WRG	CUNNINGHAM	2.0
880	7/26/82	RELEASE SWITCH DESIGN	DUPREE	2.0

NETWORK ACTIVITY NO.	SCHEDULED DATE COMMITMENTS	ACTIVITY TITLE	RESPONSIBILITY	ACTIVITY TIME IN WEEKS
561	7/29/82	BIW REL-RF RAIL FORM,8 POST,ETC	DOERR	6.0
720	8/ 9/82	FRT DR ARM REST DETAIL CHK	C.LOVE	9.0
730	8/ 9/82	TOOL AID-DOOR TRIM PANEL	DUBAY	9.0
955	8/ 9/82	SOUND & ELECTRONIC INFO	JENKINS	0.0
975	8/ 9/82	FAB/INSTALL PROG CAR HARNESS	CUNNINGHAM	2.0
680	8/10/82	RELEASE PRODUCTION DETAILS	SHEA	4.0
113A	8/16/82	I'PNL PRODUCTION DETAIL COMP	KINCAID	11.0
212	8/16/82	COMPLETE DR. MOCK-UP BELT MTGS	KOZICKI	6.0
841	8/16/82	PROG DR WRG DEV COMP	CUNNINGHAM	4.0
992	8/16/82	MANAGEMENT REV OF DESIGN AIDS	KOZICKI	0.0
760	8/23/82	QTR TRM PNL DETAIL CHK	C.LOVE	5.0
711	8/30/82	INITIAL PURCHASING REQSTN	IMRICK	3.0
842	8/30/82	PROG REL DOOR WRG	CUNNINGHAM	2.0
IP9	9/10/82	COMP I'PNL DIE MODEL	DUBAY	14.6
910	9/14/82	FAB/INSTALL PROG CAR HARNESS	CUNNINGHAM	2.0
340	9/16/82	SPECIFY VEHICLES TO ORDER	S'BERGER	0.0
230	9/17/82	PURCHASING RELEASE	IMRICK	8.0
240	9/17/82	T/A - DR I/S PANEL	DUBAY	8.0
562	9/24/82	TOOL AIDS - BIW	DUBAY	8.0
761	9/28/82	INITIAL PURCHASING REQSTN	IMRICK	5.0
770	9/28/82	TOOL AID-QTR TRM PNL	DUBAY	10.0
970	10/19/82	COMP DEVELOPMENT I/P HARNESS	CUNNINGHAM	10.0
320	10/28/82	PROCURE/FAB COMPNS.	ERNST & THIB	17.6

NETWORK ACTIVITY NO.	SCHEDULED DATE COMMITMENTS		ACTIVITY TITLE	RESPONSIBILITY	ACTIVITY TIME IN WEEKS
350	10/28/82		ORDER VALID'N CARS	THIBODEAU	6.0
965	11/ 2/82		COMP I/PNL HARNESS DESIGN	CUNNINGHAM	2.0
905	11/ 9/82		COMP DEV FRT DR WIRE HARNESS	CUNNINGHAM	8.0
980	11/ 9/82		REL PROD I/PNL HARNESS	CUNNINGHAM	1.0
330	11/18/82		INSTALL PARTS AT BUILD-UP	THIBODEAU	3.0
113B	11/22/82		I'PNL PROGRAM PARTS AVAILABLE	KINCAID	24.8
900	11/23/82		COMP DES FRT DR WIRE HARNESS	CUNNINGHAM	2.0
370	11/29/82		START VALID'N CAR BUILD	THIBODEAU	4.0
920	12/ 2/82		REL FRT DR WIRING HARNESS	CUNNINGHAM	1.0
IP15	12/ 6/82		VALID'N CAR I'PNL COMPLETE	KINCAID	1.6
379	12/13/82	R	COMP VALID'N CAR BUILD	THIBODEAU	1.0
520	12/22/82		BEGIN VEH VALIDATION TESTS	S'BERGER	1.4
530	1/20/83	R	COMP VEH VALIDATION TESTS	S'BERGER	3.0
530A	2/ 4/83		VALIDATION REPORT	S'BERGER	0.8
890	3/ 4/83		PROD PARTS AVAILABLE	DUPREE	30.0
IP10	3/25/83		C'PTE PARTS AVAIL I'PANEL	MTS	26.4
250	3/25/83		C'PTE PARTS AVAIL DOOR H'WARE	MTS	25.4
690	3/25/83		C'PTE PARTS AVAIL S'BELT H'WARE	MTS	30.8
740	3/25/83		C'PTE PARTS AVAIL FRT DR A'REST	MTS	28.0
780	3/25/83		C'PTE PARTS AVAIL QTR TRM PNL	MTS	24.0
895	3/25/83		C'PTE PARTS AVAIL SWITCH	MTS	3.0
930	3/25/83		C'PTE PARTS AVAIL FRT DR WIRING	MTS	15.0
985	3/25/83		C'PTE PARTS AVAIL I'PNL HARNESS	MTS	18.0

NETWORK ACTIVITY NO.	SCHEDULED DATE COMMITMENTS		ACTIVITY TITLE	RESPONSIBILITY	ACTIVITY TIME IN WEEKS
563	4/ 8/83		BIW PARTS FOR C'PTE START	MTS	26.2
540	4/29/83		BEGIN VEH COMPLIANCE TESTS	S'BERGER	11.8
550	6/30/83		COMP VEH COMPLIANCE TEST	S'BERGER	8.6
550A	7/ 1/83	R	COMPLIANCE REPORT	S'BERGER	0.2
999	8/ 1/83	R	VOL PROD FRAMING START	MTS	17.6

* * * *

APPENDIX TO AFFIDAVIT OF ERIC E. CHILDS

LEAD TIME IN THE DEVELOPMENT OF VEHICLES AND THEIR COMPONENTS FROM CONCEPT TO PRODUCTION

A. LEAD TIME

1. "Lead time" is the span of time needed to carry out the steps required to place into production a vehicle, or a component or subassembly of components of the vehicle, which meets all of the vehicle manufacturer's acceptance standards. That span varies with the task being considered; under the current Ford Program Timing Standard, * discussed in greater detail below in section B of this Appendix, an all-new vehicle generally requires a lead time of 5½ years, but minor components may require considerably less time. The lead time needed for a given component varies with its design complexity and the way it interrelates with other vehicle components. Most components must be especially designed for the Ford vehicle or family of vehicles in which they are to be used; very few "off the shelf" items fit into every Ford vehicle.

2. The lead time for any part must be adequate to allow performance of the following steps. These steps are generally sequential, but may overlap somewhat:

a. Concept	The selection of a series of design alternatives, an optimizing approach which typically considers factors such as function, reliability, investment and variable (unit) cost, and the rapidity with which the concept can be brought to production.

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*Vehicles intended for introduction after the 1985 model year (which are already under development) are being developed under this Standard. Vehicles intended for introduction up to the 1985 model year employ a prior standard requiring five years for the development of an all-new vehicle.

b. Design

Specific rendition of an agreed upon concept as it applies to the vehicle in question, resulting in information (e.g., engineering drawings or die models) sufficient to fabricate that part, or assembly, or vehicle.

c. Development

Test or prototype program using parts from temporary tooling to ascertain whether the part, assembly or vehicle assembled from such parts meets the performance requirements placed upon it, and, if not, to identify and resolve any problems in the design, such as function, durability, fit and finish. This phase answers the question, "Does the design work as intended?" If it does not, the preceding design step must be repeated, and new parts must be procured for development verification. If it does, the verified design is released for fabrication of production tooling.

d. Tooling

Tooling of the released design provides the means to make the part or assembly in quantities sufficient to support mass production of the vehicle.

e. Functioning

Parts produced from production tools must be trial assembled to verify their acceptablility for production with respect to function, fit and appearance, and to ascertain that the process and tooling for assembling the vehicle produce an acceptable vehicle with those parts. Failures at

this level may require redesign, redevelopment (in the case of major failures, which are rare), and/or revisions in tooling, in the parts fabrication process or in the vehicle assembly process, and refunctioning.

f. Production/ Assembly — Parts that function properly are authorized for production. Time then is required for the parts suppliers, whether within or outside Ford, to obtain raw materials and manufacture the parts at rates limited by the production capacity of the tools. Assembly of complete vehicles can begin only when all parts are available in adequate quantities and continuing supplies are assured.

3. A typical new car may have 1,400-1,500 new assemblies made up of some 30,000 or more parts. Obviously. given the foregoing sequence of steps that must be followed to develop a vehicle and parts which, when mass-produced, will perform reliably in accordance with Ford's specifications, a complex assembly such as an instrument cluster (which may be made up of as many as 300 parts) requires far more time to design, develop and fabricate than would a single part such as an arm rest or door handle. However, the progress of each part from concept to production follows the sequence of steps described above.

4. When a part or assembly in an already-design vehicle is changed, not only that change, but also the cumulative effect of the other changes which the first change necessitates affect lead time schedules. Not primarily a question of manpower or money, lead time flows from the complex interrelationships among all steps that must be coordinated if the development and production process is not to stop. Vehicle lead time depends on the individual component lead times as well as the time required to conceptualize and coordinate development and production of the whole vehicle.

B. PROGRAM TIMING AT FORD FOR A NEW-VEHICLE PROGRAM.

1. A great number and variety of Ford parts are involved in vehicle development and manufacture, and the work of a great number of specialized Ford activities must be coordinated to conceive and develop to the point of production in the shortest practicable time a new vehicle which meets Ford specifications for quality and reliability. (Please see attached Exhibit I.) Generically, these activities are Planning, Engineering, Design, Manufacturing/Procurement and Assembly. The product development process is sequential in nature; the timing performance of one Ford organization depends upon the performances of preceding organizations. The coordination of these activities is accomplished through the use of the so-called "Program Timing Standard" (Standard).

2. The Standard specifies a sequence of key steps, the activity or activities responsible for performing each step, the point in time prior to Job #1 (the date on which mass-production begins) when that step is to be performed, and the span of time alloted for its completion. Each time span is the minimum deemed necessary to produce quality products at acceptable cost levels. A failure to complete a step on time creates a risk that cost, fit, finish, or performance objectives for the part or vehicle may not be met, and therefore draws the particular attention of management.

3. Very few cars are all new in a given year. Exhibit II shows the introduction model year of every car line which is currently produced by Ford. From this it can be seen that there are rarely more than three or four really new vehicles introduced in a given year. The development period for Ford vehicles now being developed for introduction after the 1985 model year extends from 38 months for a vehicle to which merely exterior styling changes are being made, to 66 months for an all-new vehicle. Vehicle development programs are staggered to distribute the workload more evenly. Each activity involved in the development process is working in any given calendar year on a succession of developmental vehicles intended for introduction over a period of three or more model years.

4. *The Planning Sequence*
The planning sequence at Ford consists of three major phases, the Concept, the Advance, and the Production phases. As already mentioned, for an all-new vehicle their performance is scheduled to require 5-1/2 years for an all-new vehicle:

a. *Concept*
66 months before Job #1 (i.e., the date on which mass production of vehicles begins)

In this span of 12-15 months which is scheduled to start 66 months before Job #1, (the date on which mass-production of vehicles begins) alternative vehicle concepts for a given model are explored. New powertrains start this phase some nine months earlier (i.e., 75 months prior to Job #1). By "concepts" is meant the possible combinations of vehicle elements such as size, package (usable room for people, luggage, components), body construction, bumpers, brakes, suspension and engine and drive line placement for meeting the requirements of the marketplace and the law in the context of available resources. Among the procedures used to gather information for generating concepts are market surveys, competitive model tear downs and drive evaluations, and other "paper studies." The activities of this phase typically produce a series of alternative concepts and a generalized notion of a vehicle size that is practicable.

b. *Advance*
54 months before Job #1

The concept alternatives are further developed in the Advance phase, which is scheduled to begin 54 months before Job #1 and to last 16 months. The objective of this phase is to

select a single program concept. That concept will include a set of vehicle assumptions that describes critical dimensions (called "Hardpoints") and complete specifications for vehicle aspects such as weight, fuel economy, repairability, investment and cost, and "image" — how the intended vehicle will relate to the market. These assumptions are developed by means of the first detailed work in full-scale clay models, which verify the acceptability of vehicle dimensions and appearance. These assumptions also are developed by cost studies, and by construction and test of prototype vehicles called Advanced Mechanical Prototypes; the test results verify chassis, structure, and suspension concepts.

c. *Production*
38 months before Job #1

(1) Management acceptance (which is scheduled to occur 38 months before Job #1) of assumptions developed in the Concept and Advance phases starts the last phase (Production). Initially, Management selects a single vehicle design concept and approves critical vehicle dimensions called "Structure Hardpoints."

(2) Production is the most costly phase, for in this phase occurs the detailed design, engineering, testing and tool expenditures, the tool tryouts, pilot assembly and production. Approval of the two major appearance

aspects of the vehicle, the exterior ("sheet metal") and instrument panel is scheduled to occur concurrently at 36 months; all other details follow. The first set of prototype vehicles, which embody initial designs and are constructed with prototype tools, are scheduled to be completed at 20-1/2 months before Job #1, for initial crash and durability testing. Information resulting from this testing will be used to refine the design of the vehicle. The second set of prototype vehicles also constructed with refined prototype tools, and scheduled to be completed six months later, will incorporate the design change made in view of the results of this testing. Testing of this second set of prototype vehicles will be used to validate the first tests and also to test additional performance aspects of the vehicles. A third set of prototype vehicles, employing a body structure produced by production tools but otherwise employing parts made by refined prototype tools, is completed at about 8-3/4 months before Job #1. This set is tested to ascertain whether design modifications made in view of previous test results have brought the vehicle per-

formance up to specification. In this way the vehicle design is gradually refined to achieve all objectives.

(3) All component parts must be trial assembled into vehicles ("functioned"), after being produced from production tools, to ascertain whether the designs were properly executed and whether all parts fit. Because the translation from engineering instructions to tooled parts may be imperfect, some parts may not fit and function properly the first time. Those parts must be made to fit and work cooperatively with other vehicle parts by revising design, tools, parts fabrication processes and/or vehicle assembly processes. To provide adequate time for this cut-and-dry procedure, production sample parts are scheduled to become available seven months prior to Job #1. This "Functional Program" is conducted at a pilot plant. Production parts are scheduled to be trial assembled into vehicles two months before Job #1, in a program at the assembly plants intended to familiarize plant personnel with the assembly processes and to test the feasibility of those processes for mass production. The actual Job #1 date is established upon

satisfactory completion of the sampling programs.

These principal steps of the current Ford Timing Standard and the corresponding times for their initiation or completion, as the case may be, are summarized in Exhibit III of this Appendix.

EXHIBIT I

KEY ACTIVITY GROUPS AT FORD
and their principal activities

Activity	
Planning	There are a number of groups concerned with predicting the kinds of vehicles which will be attractive to purchasers, preparing for Management consideration (with the aid of numerous other Company activities specializing, e.g., in marketing, finance, engineering and procurement) a proposal encompassing all aspects of each such vehicle, e.g., its appearance, features, dimensions, passenger and luggage capacity, mileage range, performance characteristics, cost and potential market, and, upon approval by Management of each vehicle proposal, guiding the development of the vehicle to production.
Advanced Engineering	This activity devises engineering concepts to meet the vehicle parameters determined by planning activities, for example, front wheel drive or rear wheel drive, the type of body construction, suspension configurations, and power-train configurations.

Design	This activity is concerned with developing the appearance of vehicles, and of most of their visible components, which embody concepts provided by the various engineering activities and by planning. In the course of such development, this activity sculpts full size clay models of such cars and of many of their components.
Component Engineering	These activities are charged with translating design and engineering concepts into engineering information required to manufacture components and vehicles.
Development Engineering	This engineering activity is concerned with achieving over-all vehicle and component performance to objectives of function, quality, and reliability—the "test track" people.
Procurement	These activities deal with the many outside suppliers of component parts, to translate component engineering information (blueprint drawings, die models, etc.) into production parts.
Basic Manufacturing Divisions	These divisions of Ford produce some production parts; the balance of these parts are made by outside suppliers.
Assembly Division	This activity initially trial-assembles ("functions") production parts into pilot-production vehicles, and after "prove-out" in pilot production, assembles these parts into mass production vehicles.

EXHIBIT II

FORD'S MAJOR CAR PROGRAMS BY MODEL YEAR OF VEHICLE INTRODUCTION

1978	1978¼	1979	1980	1981	1981½	1982
Fairmont/ Zephyr						
	Futura/Z7					
		Ford/Merc. Mustang/ Capri				
			Lincoln/ Mark T-Bird/XR7			
		Pinto/ Bobcat		Escort/ Lynx Granada/ Cougar		
					EXP/LN7	
						Continental

EXHIBIT III

CURRENT SUMMARY OF FORD NORTH AMERICAN AUTOMOTIVE OPERATIONS (dated 3/31/81)

	Step	Months Before Job #1
—	Start Vehicle Concepts — vehicle size, concepts in components explored e.g. suspension, bumpers, brakes, weight parameters	66
—	Start Advance Development — Start clay development to prove out concepts	54
—	Complete Advanced Mechanical Prototype — an operable vehicle to prove out and develop suspension, structure, and package (vehicle size)	43
—	Approve Structure Hardpoints/Select Prime Program (Start of Production Phase)	38
—	Approve Theme Clay Appearance — Sheetmetal and Instrument Panel	36
—	Complete Production Mechanical Prototype	31
—	Approve Program/Final Hardpoints	30
—	Complete First Prototype Level	20½
—	Complete Second Prototype Level	14½
—	Complete Third Prototype Level	8¾
—	Complete Engineering	10
—	Provide Production Samples/Start Functioning	7

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *et al.*,

Respondents

AFFIDAVIT

WILLIAM J. WITTENBERG, being duly sworn, deposes and says:

1. I am Assistant Chief Engineer, Fisher Body Division, General Motors Corporation (GM). I have been employed in this capacity since May 1, 1979, and have been employed by GM since June 1953. From February 1, 1978, to November 19, 1981, I was Project Manager of GM's Automatic Belt Project Center. The duties of this position included overall responsibility for design, development, and product release of automatic belt restraint systems for GM passenger cars. As part of these duties I was regularly called upon to establish and project lead

time requirements, and program content for the automatic seat belt programs.

2. I am familiar with the Court's request for information on the amount of time that would be required by automobile manufacturers to redevelop automatic seat belt programs in the event that the Court invalidates in whole or in part the NHTSA's rescission order issued on October 23, 1981.

3. In reaching the judgments expressed below I have made three very important assumptions:

(a) If the Court were to invalidate the rescission order, the performance requirements of FMVSS 208 would be identical to those in the standard prior to rescission. For example, I have not considered in this affidavit the substantial additional time that would be required if FMVSS 208 were to be amended so as to prohibit detachable automatic seat belts.

(b) The order of implementation of the automatic restraint requirements of FMVSS 208 would be the same as existed at the time of rescission. Specifically, I have assumed that FMVSS 208 would be effective at the beginning of the same model year for all passenger cars with a wheel base of more than 100 inches, and at the beginning of the following model year for all passenger cars with a wheel base of 100 inches or less.

(c) Outside engineering and tooling companies would be available in the same proportion as before the rescission, and no significant work delays or stoppages beyond our control would occur during the relevant time periods.

4. I am aware that the petitioners have contended that something on the order of a 4-6 month lead time is sufficient to put automatic seat belt programs into production. This contention appears to be based on the presumption that the replacement of current manual belts by automatic belts would simply be an exchange of similar components, much as manufacturers were able to "convert" to exclusive production of manual belts for their large cars after the granting of the one-year delay in the

effective date of the passive restraint requirements for those cars. This contention is not valid. Manual seat belts were incorporated in all vehicle lines at the time the one year delay was announced, so no "conversion" to manual seat belts was necessary. Thus, the delay did not require GM to remove or change any parts or components in its supply system or to change or remove any tools or other equipment in its production system.

Also, an automatic seat belt system that will meet the requirements of FMVSS 208 is more complex and much more difficult to develop and manufacture than the current manual belt system. For example, a typical vehicle restraint system utilizing automatic seat belts contains approximately twice as many component parts as one utilizing manual seat belts. This increased complexity is apparent from a comparison of the retractor hardware requirements for an automatic seat belt system (See Attachment 1) and a manual seat belt system (See Attachment 2). Moreover, manual belts represent existing technology and have been in production in various forms for many years. In contrast, automatic belt technology is still in a development stage, and none of the automatic belt systems that GM would use has ever been produced in quantity, or installed on a mass production basis.

Finally, manual belt programs would be required *even* if automatic restraint requirements were to be instituted. These programs would be necessary to provide for foreign markets where automatic seat belts are not required and in some cases, such as Canada, restricted by applicable standard. The imposition of automatic belt requirements would necessitate the addition of 36 different seat belt system configurations for the nine GM vehicle lines which would have required automatic belts in the 1983 model year, resulting in the proliferation of approximately 2250 new parts. In addition, vehicle modifications would be required to accommodate automatic belt attachment and to facilitate automatic belt system operation. For example,

modifications would be necessary in the following vehicle areas"

- Front Door Assembly
- Vehicle Interior Trim
- Underbody Assembly
- Front Seat Frames
- Vehicle Carpeting
- Roof Rail Assembly
- Center Console
- Center Pillar Assembly
- Wiring Harnesses
- Instrument Panels

Based on the above, it is apparent that a manufacturer's ability to "convert" to exclusive production of manual seat belts in six months does not demonstrate the ability to develop, manufacture, and incorporate automatic seat belt systems in the same time frame.

5. The lead time required for GM to redevelop automatic seat belt programs for its existing vehicle lines having wheel bases greater than 100 inches would be 21 months. This projection does not reflect the time required to complete any single automatic seat belt program. Rather, it is based on the effort required to complete design and development efforts on nine vehicle lines, e.g., X cars, J cars. These vehicle lines encompass 29 different models, e.g. Chevrolet Impala, Buick LeSabre, Oldsmobile 88, utilizing 64 different body shells (2 door, 4 door, station wagons, where applicable). These efforts would utilize reasonable business and resource allocation practices, and make maximum possible use of concurrent scheduling.

Further, the projection reflects the fact that the redevelopment of automatic restraint technology is not simply a continuation of previous efforts. Since the termination of our automatic seat belt programs on October 23, 1981, technical resources previously allocated to those programs, have been allocated to other areas. Additionally, much of the hardware used in that program has been diverted to other use or other-

wise disposed of. Finally, vendor contracts to engineer and fabricate automatic seat belt tooling have been cancelled. Significant efforts would be required to reinstate these activities due to the magnitude of our overall program.

The above lead time projection for existing vehicle lines would not be sufficient for future vehicle lines, i.e. those vehicles scheduled to begin production in model years after 1983. Automatic seat belt programs for future vehicles would not significantly benefit from development programs in place prior to the NHTSA rescission. At that time automatic seat belts for those vehicles were in a preliminary stage of development. Thus, the lead time would necessarily be longer.

Attachment 3 sets forth the necessary program elements upon which this lead time projection is based. It should be noted that many of these elements, which are described in the following paragraphs, take place concurrently. Thus, they must be considered collectively in terms of overall program lead time.

Reassemble Engineering Technology (3 mo.) refers to the effort necessary to reassemble both internal and external technical resources, including personnel, previously allocated to the automatic belt programs. This category also includes time to reestablish design, testing, hardware fabricating and tooling facilities of outside suppliers. Before the rescission over 200 GM engineering personnel and a substantial number of outside personnel were assigned to this project. This work force must be reassembled in an orderly fashion so as to preclude extensive disruption of other essential functions.

Evaluate Design Status (4 mo.) reflects the time that would be necessary to review the design status of each particular body style as it existed when the automatic seat belt project was terminated. Engineering data would have to be retrieved from storage areas, or data banks, and evaluated for design content and completeness. This would necessitate the review of thousands of design and test documents. Further, an evaluation would be required of revisions made to any of the 29

vehicle models since the rescission which could affect the automatic belt design.

Finalize System Design (4 mo.) is the effort required to update and complete the design. This would include any necessary belt system and vehicle modifications due to product revisions, and analysis of test data. It also includes finalizing and releasing production tooling drawings.

Obtain Verification Cars (2 mo.) refers to the time necessary to obtain approximately 145 production or prototype vehicles for verification and certification barrier tests. The vehicles originally obtained for this purpose have been sold or reallocated for other test purposes. Each of the vehicles obtained would have to be modified to incorporate automatic belts.

Pre-Prototype Retractor and Hardware Fabrication (3 mo.) — These items are early versions that are hand made and may not be fully functional, but are used for testing purposes.

Build Sled Test Body Fixtures (4 mo.) — Sled test body fixtures are basically the passenger compartments of production or prototype vehicles modified so they can be mounted on a pneumatic sled that simulates a crash impact. These tests are then analyzed and are an important tool in the development of proper restraint performance and component design.

Retractor and Hardware Prototype (3.5 mo.) are necessary for the fabrication of limited quantities of retractor and other hardware items to production type configurations for test and evaluation purposes. Sources for many of these tools would have to be obtained outside of GM.

Prototype Retractor and Hardware Build (9 mo.) is the effort necessary to produce limited quantities of hand built seat belt hardware for component impact sled and barrier testing. These first production type items are also used to make preliminary vehicle installations of automatic seat belt systems for evaluation purposes. Information from these evaluations is used to finalize system designs, as described above.

Release all Components (5 mo.) reflects the documentation effort to identify individual parts and authorize them for use on a particular design. This process also authorizes plants and vendors to take necessary action for planning floor space, and taking related actions.

Production Tools—Retractor and Hardware (9 mo.) and *Production Tools—Vehicle Interior Trim, Seats, Console (12 mo.)* are the activities required to build the tools, dies, and fixtures necessary for the manufacture of mass production parts at 11 metal fabricating plants, 11 trim and hardware fabricating plants, and 7 outside facilities designated to manufacture retractor assemblies. This also includes the process of assuring that the tools, as fabricated, will perform their necessary functions.

Development Sled Tests (3 mo.) are performed to finalize and optimize individual components so that they will meet all applicable performance and hardware requirements. These tests, utilizing components fabricated from prototype tooling, are performed on the sled test body fixtures described above.

Verification Sled Tests (6 mo.) are automatic seat belt system tests using components made to production configurations. These tests are utilized to assure that the performance of the system conforms to design intent.

Verification Barrier Tests (9 mo.) consist of crash tests utilizing the verification cars described above. The tests are conducted to supplement verification sled tests and to assure that the performance of the automatic seat belt system and its influence on other vehicle components are compatible with and conform to design intent.

Certification Barrier Tests (2 mo.) are barrier tests run to demonstrate compliance of production vehicles with the requirements of all applicable Federal motor vehicle safety standards.

Body Pilot Build (3 mo.) — The start of body pilot is a most important landmark in the manufacturing of our automotive body. The body pilot is the first assemby of bodies using all production type components in very limited quantities by

specially qualified personnel at facilities maintained for this purpose prior to the start of mass production. The main purpose is to uncover any tooling or assembly methods that do not function properly or produce quality parts or assemblies effectively. We would require approximately 3 months between the start of body pilot and the start of production to correct any discrepancies found during the pilot program and to stock 23 assembly plants with component parts.

6. The changes required to incorporate 36 automatic belt systems in the nine vehicle lines discussed in paragraph 5 above are so substantial that they could not be reasonably accomplished during production. These nine vehicle lines constitute GM's entire passenger car production, with the exception of three sub-compact models. As described in paragraph 3 above, the imposition of an automatic seat belt requirement would result in greatly increased complexity in the manufacturing process, and in a massive proliferation of parts. Thus, the changeover would require a complete shutdown of our 23 assembly plants for those vehicles for a minimum of three weeks, and could only be accomplished during a scheduled "shutdown period" for a regular model year changeover program without extensive disruption of production.

/s/ WILLIAM J. WITTENBERG
William J. Wittenberg

STATE OF MICHIGAN
COUNTY OF MACOMB

Before me this 28 day of January, 1982, appeared William J. Wittenberg, known to me to be the person whose signature appears above, and subscribed and sworn to the above affidavit, consisting of eight pages.

/s/ DONALD J. CASTLE
Donald J. Castle
Notary Public
Macomb County, Michigan
My Commission expires 3-25-84.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

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NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent.

NHTSA'S MEMORANDUM IN RESPONSE TO THE COURT'S AUGUST 4, 1982 ORDER

By order of August 4, 1982, this Court directed NHTSA to advise the Court by October 1, 1982, whether a September 1, 1983 "compliance date," for the passive restraint requirements of Federal Motor Vehicle Safety Standard 208, "is achievable, or whether a longer period is required, setting forth adequate reasons therefor." This memorandum constitutes NHTSA's response to the Court's inquiry. It is filed solely in response to the Court's directive, and without prejudice to the Agency's right to seek review of the Court's June 1, 1982 opinion and

August 4, 1982 order, or to proceed administratively to modify either the substantive requirements or compliance dates of Standard 208, if such modifications are determined to be necessary. For the reasons stated herein, and the attachments hereto, NHTSA advises the Court that should its opinion and supplemental order withstand Supreme Court review, a September 1, 1983 compliance date is *not* achievable, and that a significantly longer period than the thirteen months provided by this Court would be required for practicable compliance.

NHTSA has not yet conducted the necessary rulemaking to amend the effective date of Modified Standard 208. Should the Supreme Court of the United States deny respondents' Petition for a Writ of Certiorari already filed in this case, it would be necessary for NHTSA to conduct a rulemaking proceeding to consider technical amendments to the Standard before it could take effect, and to provide a practicable compliance date.

I. A SEPTEMBER 1, 1983 COMPLIANCE DATE FOR THE PASSIVE RESTRAINT REQUIREMENTS OF MODIFIED STANDARD 208 IS NOT ACHIEVABLE—A SUBSTANTIALLY LONGER PERIOD IS REQUIRED

Promptly after this Court's August 4th order, NHTSA, on August 9, 1982, requested current information concerning the ability of manufacturers to comply with the September 1, 1983 effective date, and the consequences to them if this compliance date remains in effect. Attached to this memorandum are affidavits and letters, furnished NHTSA in response to its request, from 19 automobile manufacturers accounting for approximately 98 percent of all vehicles sold in this country.

None of the manufacturers has stated that it would be able to comply with the reinstated automatic restraint requirement on September 1, 1983. Only Volkswagen of America and Toyota have represented that they might partially comply, but this compliance would be possible only with respect to vehicles which are already in car lines equipped with automatic belts, or where automatic belts are presently offered as an option. (*See* VW Haenchen Statement at 2; Toyota letter at 4.) Some major

manufacturers estimate that a lead time of 21 to 24 months would be required for those models which could be converted to automatic restraints most easily. (*See, e.g.*, General Motors Horvath Affidavit at 2; Ford Ross Affidavit at 2; Chrysler letter at 1; Nissan letter at 1; Toyota letter at 4; American Motors Jones Supplemental Affidavit at 1; Mitsubishi letter at 2.) Almost all manufacturers also state, however, that for many of their models compliance will not be possible until September 1985, and, in a few instances, even later. (*See, e.g.*, Subaru letter at 1; Toyota letter at 4; Isuzu letter at 1; Mazda letter at 1; Mitsubishi letter at 2; Rolls-Royce letter at 2; American Motors Jones Supplemental Affidavit at 1; Chrysler letter at 1.) Only the largest domestic and Japanese manufacturers, General Motors and Nissan, and two European manufacturers, Volvo and BMW, have said that a compliance date of September 1984 could enable them to continue marketing many of their models. (*See* BMW letter at 2; General Motors letter at 1; Volvo letter at 1; Nissan letter at 1.) Virtually all of these estimates are specifically premised on the assumption that Modified Standard 208 will not be amended (*see, e.g.*, General Motors letter at 1; Ford Ross Affidavit at 2; Chrysler Withrow Affidavit at 15; Toyota letter at 1; Mitsubishi letter at 2; Subaru letter at 1), and many on other assumptions discussed below.

As a group, the manufacturers cited numerous credible reasons why a September 1, 1983 compliance date is not achievable, and why the longer lead times specified are required.

First, a September 1, 1983 compliance date is particularly inappropriate for cars with a wheel base of less than 100 inches, sales of which constitute approximately 41 percent of current production. Under Modified Standard 208 as originally adopted in 1977, passive restraints were not required in small cars until September 1, 1983. However, Modified Standard 208 stood rescinded for almost 1 year, and, at least as of December 7, 1981, when this Court denied a stay of NHTSA's rescission of the passive restraint requirements of Modified Standard

208, manufacturers were fully justified in abandoning their passive restraint programs. Yet, notwithstanding that justifiable reliance by manufacturers, this Court's August 4th order would nonetheless require passive restraints in small cars by the same date as originally proposed.

Second, for both small and large cars, the passive restraint programs are not at the same point of development as they were when the manufacturers justifiably halted their programs. Because of the rescission, and this Court's denial of a stay, resources committed to automatic restraint compliance were properly diverted to other projects. (*See, e.g.*, Saab letter at 1; Jaguar letter at 2; Chrysler Withrow Affidavit at 3; Ford letter at 2.) Most significant in this process was the reassignment or release of skilled employees assigned to design teams—the reassembly of which is time-consuming, and made difficult by the present non-availability of some of those employees. (*See, e.g.*, General Motors letter at 2; Ford letter at 1-2; Chrysler Withrow Affidavit at 3-4; Saab letter at 1; Subaru letter at 1; Volvo letter at 2.) In any event, while changes in the design of various model lines went forward, the corresponding development of passive restraint systems to fit those redesigned models remained halted. (*See, e.g.*, Chrysler Withrow Affidavit at 5; Toyota letter at 3; Mazda letter at 1; VW Haenchen Statement at 3; Honda letter at 1; Jaguar letter at 2.)

Third, even after reassembly of the design team, the design problems for automatic restraint systems remain substantial. Separate and distinct automatic restraint system designs are required for different models within car lines. General Motors, for example, expected to design 36 different automatic seat belt configurations for its nine different car lines. (*See* Exhibit E to Brief of MVMA and AIA filed in this Court on February 1, 1982.) (*See also* Chrysler Withrow Affidavit at 5-8; Toyota letter at 3; Mitsubishi letter at 1.) Moreover, the redesign problems are not limited to a narrow portion of the vehicle interior. Vehicle parts and systems which might undergo redesign include the following: front door assembly, vehicle interior trim, underbody assembly, front seat frames, vehicle carpert-

ing, roof rail assembly, wiring harness, instrument panels and others. (*See, e.g.*, Chrysler Withrow Affidavit at 7-8; Toyota letter at 2.)

Fourth, all phases of the design, development, testing and production of automatic restraint systems cannot occur simultaneously—necessarily a *sequence* of time consuming steps must be completed by the manufacturers. Even after reassembly of the design team and the updating of design work to fit current models, numerous steps remain to be followed—none of which may be safely eliminated or advanced in the schedule. These steps include designing prototypes, obtaining prototypes, testing prototypes, designing final systems, obtaining finally designed parts, testing finally designed parts, obtaining certification, ordering parts, and retooling and converting production lines. (*See, e.g.*, General Motors Horvath Affidavit at 2-5; Ford letter at 1; Exhibit B to Chrysler Withrow Affidavit.)

Fifth, an early simultaneous compliance date for all models could exacerbate the renegotiation of contracts between the manufacturers and the limited number of passive restraint parts suppliers, as well as adversely affect those suppliers' delivery schedules. (*See, e.g.*, General Motors letter at 2; Volvo letter at 2; Jaguar letter at 2.) This problem may be aggravated for small manufacturers who are not equipped to simultaneously design, test, and produce different systems for different models (*See, e.g.*, Isuzu letter at 1; Saab letter at 1.) Further, an organization of active and passive belt manufacturers has informed NHTSA that its members need approximately nine months from the submission of final designs by the manufacturers in order to begin supplying restraint systems, and that as of September 3, 1982 they had not received those designs. (*See* Am. Seat Belt Council letter.)

Sixth, compliance with the passive restraint standard, especially early complaince, extracts a high cost from the manufacturers. General Motors has, in its most recent submission, estimated its costs at $375 million (General Motors letter at 2);

Ford has estimated costs of as much as $280 million (Ford letter at 2); and Chrysler's estimate is $100 million (Chrysler Steffen Affidavit at 3). Early compliance will require the diversion of resources and personnel from other programs, such as those for increased fuel efficiency and safety, at a cost to the manufacturer and the consumer. (*See, e.g.*, Chrysler letter at 1; Chrysler Withrow Affidavit at 14-15; Ford letter at 2.) Moreover, since the conversion of production lines in order to begin compliance can only be accomplished when the assembly plants are entirely shut down, the conversion should be scheduled to coincide with the start of a model year. A mid-model year shutdown would cause substantial loss of production and employment and therefore would be extremely costly to manufacturers and their employees. (*See, e.g.*, General Motors letter at 1; Mazda letter at 2; Chrysler Withrow Affidavit at 11-12.)

Finally, if the September 1, 1983 compliance date remains in effect, manufacturers unable to comply would be required to cease production until compliance could be attained. (15 U.S.C. §§ 1397, 1387.) To virtually all manufacturers the results of such disruption would be catastrophic. (*See, e.g.*, General Motors letter at 2; Ford Ross Affidavit at 4; Toyota letter at 4; Rolls-Royce letter at 1; Subaru letter at 3.) Chrysler has said that it could not survive as a corporation in such event. (Chrysler letter at 1; Chrysler Steffen Affidavit at 2.)

The submissions of the manufacturers have been reviewed by the expert technical staff of the National Highway Traffic Safety Administration. Based upon these submissions, and the record before the agency, NHTSA is of the opinion that the manufacturers have demonstrated convincingly that a September 1983 compliance date is impossible, and that the lead time estimates of the manufacturers are generally valid, accurate, and consistent with the engineering and economic circumstances which the agency finds to prevail in the industry at the present time. See Affidavit of Courtney M. Price, Associate Administrator for Rulemaking of NHTSA.

II. NHTSA, AND NOT THIS COURT, IS STATUTORILY EMPOWERED TO ESTABLISH A NEW EFFECTIVE DATE FOR MODIFIED STANDARD 208.

As Part I demonstrates, compliance by September 1, 1983 is not achievable. Although NHTSA received substantial comments from the manufacturers on the achievability of a September 1, 1983 compliance date, it cannot, of course, formally establish a new compliance date for Modified Standard 208 without conducting a rulemaking proceeding pursuant to the APA. Based on the manufacturers' submissions and the record to date, however, NHTSA hereby advises the Court that practicable compliance with Modified Standard 208 could not be achieved before September 1, 1985 at the earliest. *

This Court should not attempt to prescribe a new effective date for implementation of Modified Standard 208. As the Solicitor General has argued to the Supreme Court, "[i]t is for the Secretary, not the court, to determine in the first instance whether and when Modified Standard 208 should go into effect in light of existing circumstances. This determination then would be subject to judicial review only under the arbitrary

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*There remains considerable doubt that uniform compliance could easily be achieved even in September of 1985. While some manufacturers assert that, under ideal conditions, compliance could begin for some car lines from 21 to 24 months after a final order, or theoretically as early as September of 1984 if the standard remains unchanged from its present form (*see, e.g.*, General Motors letter at 1), others have found that more than 36 months would be required in any event for some or all models. For such manufacturers (*see* Saab letter at 1; VW Haenchen Statement at 3), sale of such cars would be impossible even in September 1985. The basis for NHTSA's opinion that practicable compliance could not occur before September 1985 is that a model year start date (*i.e.*, September of any given year) is necessary and that any such date earlier than 1985 would preclude most if not all manufacturers from producing major car lines. Such a result would jeopardize the existence or economic integrity of several manufacturers, (*see, e.g.*, Chrysler letter at 1; Ford Ross Affidavit at 4).

and capricious standard. Once the court of appeals identified errors in the agency's decision, the court was barred from further 'dictating to the agency the methods, procedures, and time dimensions of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency.' *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 544-545, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976)." *See* Petition for a Writ of Certiorari, *U.S. Department of Transportation, et al.* v. *State Farm Mutual Automobile Ins. Co., et al.*, No. 82-398 at 27-28 (filed September 8, 1982).

If the Supreme Court denies the Petition for a Writ of Certiorari filed by the Secretary, it will be time enough then for NHTSA to promptly conduct a rulemaking to consider new evidence from the manufacturers and other interested parties, and to provide a new effective date for Modified Standard 208. In any event, before the Standard could take effect, further rulemaking would be necessary to address various technical amendments to the Standard, such as the requirement for passive protection for the front center seating position, (*see* 46 Fed. Reg. 21,205 (April 9, 1981) and 46 Fed. Reg. 53,419 (Oct. 29, 1981))—a proposed amendment to the Standard which was pending before the Agency, but mooted by its decision to rescind. Any amendments to the Standard will change the obligations imposed on the manufacturers by this Court's August 4, 1982 order reinstating Modified Standard 208, and might require readjustment of the necessary lead time for compliance.

If the Petition for a Writ of Certiorari is granted there would be at that time compelling grounds for a stay of this Court's June 1st and August 4th orders. It would not be "practicable" or "reasonable" under the Safety Act (15 U.S.C. § 1392), to require manufacturers to begin compliance with a standard—that might yet be amended—which NHTSA believes it had lawfully rescinded, and the judicial reinstatement of which the Supreme Court had just agreed to review.

CONCLUSION

For the foregoing reason NHTSA concludes that a September 1, 1983 compliance date is not achievable, and that a substantially longer lead time is required.

Respectfully submitted,

OF COUNSEL:
FRANK BERNDT
Chief Counsel
STEPHEN P. WOOD
Assistant Chief Counsel
DAVID W. ALLEN
Assistant Chief Counsel
HUGH F. OATES
EILEEN T. LEAHY
SHIRLEY RANSOM
Attorneys
National Highway Traffic
Safety Administration
Department of Transportation
Washington, D.C. 20590

J. PAUL MCGRATH
Assistant Attorney General
/s/ Robert E. Kopp
ROBERT E. KOPP (202) 633-3311
Director, Appellate Staff
/s/ Michael F. Hertz
MICHAEL F. HERTZ (202) 633-3180
Appellate Litigation Counsel
/s/ Frederick Geilfuss
FREDERICK GUILFUSS (202) 633-5684
Attorney
Civil Division
Appellate Staff, Rm. 3617
Department of Justice
Washington, D.C. 20530

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et. al.*,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent.

AFFIDAVIT OF COURTNEY M. PRICE

Courtney M. Price, being first duly sworn, deposes and says:

1. I am Associate Administrator for Rulemaking of the National Highway Traffic Safety Administration (NHTSA).

2. As Associate Administrator for Rulemaking, I am responsible for administering the NHTSA programs for setting standards under the various statutes administered by NHTSA, including Federal motor vehicle safety standards established under the National Traffic and Motor Vehicle Safe-

ty Act of 1966 as amended (the Safety Act). Federal Motor Vehicle Safety Standard 208, Occupant Crash Protection, is such a standard. The Rulemaking component of NHTSA reviews and evaluates submissions of manufacturers concerning lead times for compliance with standards, and provides technical, expert support for lead time decisions pursuant to Section 103(c) of the Safety Act.

3. I am familiar with the history and record of FMVSS 208 and with these proceedings for judicial review of the October 23, 1981 order of the Administrator rescinding the automatic restraint requirements thereof. I have reviewed the submissions of motor vehicle manufacturers to this Court and to NHTSA concerning the lead time questions which have been raised herein.

4. The subject of lead time was addressed by participants in the original rulemaking proceeding, because of the phase-in nature of such requirements as originally adopted (compliance requirement by size and type of vehicles for model years 1982 to 1984). This issue was also addressed in affidavits and a letter submitted on behalf of manufacturers with the joint brief of Intervenors Motor Vehicle Manufacturers Association and Automobile Importers Association, filed in this judicial review action, in February 1982.

5. After this Court entered its order of August 4, 1982, effecting reinstatement of such requirements with an effective date of compliance for all cars of September 1, 1983, the NHTSA Chief Counsel, Mr. Frank Berndt, sent letters to counsel for such intervenors requesting current information on the manufacturers' ability to comply with the reinstated requirement on or before September 1, 1983. Mr. Berndt's letter also requested manufacturers to describe the consequences to them if the September 1, 1983 compliance date were retained. NHTSA received written responses from nineteen manufacturers whose production accounts for approximately 98 percent of all new cars sold in the United States.

6. I and members of my staff have reviewed and analyzed these responses. All manufacturers have stated that they are unable to comply with the automatic restraint requirement on or before September 1, 1983. In fact, only Volkswagen and Toyota have said that they could partially comply on this date, and their partial compliance would involve only those car lines in which automatic restraints were already available as standard equipment or as an option. Some manufacturers have said that, if all contingencies were favorable, compliance would be theoretically possible for those car lines as to which prior design and engineering of automatic restraints had been underway, approximately two years after a final decision establishing the requirement. Most have also said that, for other more recently developed or planned car lines, compliance would not be possible until at least one year later. Because the compliance date for vehicles having less than 100-inch wheel bases was September 1, 1983 prior to rescission in October 1981, the reinstatement of the same simultaneous compliance date after almost one year of discontinued compliance efforts has the effect of significantly reducing the time for compliance in these smaller car lines. Cars under 100 inches in wheel base constitute approximately 41% of all cars sold in the United States.

7. The passive restraint programs are not at the same point of development as they were when the manufacturers halted their programs. After recission of the passive restraint requirements of Modified Standard 208, resources committed to automatic restraint compliance were diverted to other projects. Skilled employees assigned to design teams have been reassigned or released and may not be readily available.

8. After reorganization of the design teams, a time consuming effort must be completed by these teams before other production process changes can begin. Separate and distinct automatic restraint system designs are required for different models within car lines. General Motors, for example, expected to design 36 different automatic seat belt configurations for its nine different car lines. Vehicle parts and systems which

might undergo redesign include the following: front door assembly, vehicle interior trim, underbody assembly, front seat frames, vehicle carpeting, roof rail assembly, wiring harness, instrument panels and others.

9. In addition, all phases of the design, development, testing and production of automatic restraint systems cannot occur simultaneously. A sequence of time consuming steps must be completed by the manufacturer, and none of these steps can be eliminated or advanced in the schedule. These steps include designing prototypes, obtaining prototypes, testing prototypes, designing final systems, obtaining finally designed parts, testing finally designed parts, obtaining certification, ordering parts, and retooling and converting production lines.

10. An early simultaneous compliance date for all models could exacerbate the renegotiation of contracts between the manufacturers and the limited number of passive restraint parts suppliers, as well as adversely affect those suppliers' delivery schedules. This problem may be aggravated for small manufacturers who are not equipped to design, test, and produce different systems for different models simultaneously. Indeed, an organization of active and passive belt manufacturers has informed NHTSA that its members need approximately nine months from the submission of final designs by the manufacturers in order to begin supplying systems, and that as of September 3, 1982 they had not received any such designs. (*See* Am. Seat Belt Council letter.)

11. Early compliance will require the diversion of resources and personnel from other programs, such as those for increased fuel efficiency and safety, at a cost to the manufacturer and the consumer. Moreover, since the conversion of production lines in order to begin compliance can only be accomplished when the assembly plants are entirely shut down, the conversion should be scheduled to coincide with the start of a model year. A mid-model year shut-down would cause substantial loss of production and employment and therefore be extremely costly to manufacturers and their employees.

12. Compliance with the passive restraint standard, especially early compliance, extracts a high cost from the manufacturers. General Motors has, in its most recent submission, estimated its costs at $375 million; Ford has estimated costs of as much as $280 million; and Chrysler's estimate is $100 million.

13. Finally, if the September 1, 1983 compliance date remains in effect, manufacturers unable to comply would be required to cease production until compliance could be attained, in order to avoid production and sale of nonconforming vehicles in violation of the Safety Act. To virtually all manufacturers the results of such disruption would have great adverse consequences. General Motors has predicted that such consequences would be catastrophic, and we believe that this would be true of nearly all manufacturers. Chrysler has said that it could not survive as a corporation if the losses caused by such disruption were to occur.

14. The submissions of the manufacturers have been reviewed by the expert technical staff under my supervision. Based upon these submissions, and the record before the agency, it is my conclusion and that of our technical staff that the manufacturers have demonstrated convincingly that a September 1983 compliance date is impossible, and that the lead time estimates of the manufacturers are generally valid, accurate and consistent with the engineering practices and economic circumstances which prevail in the industry at the present time.

I have read the foregoing 14 paragraphs. The statements contained therein are true and correct to the best of my knowledge.

/s/ Courtney M. Price
COURTNEY M. PRICE
Associate Administrator
for Rulemaking

Subscribed and sworn before me
this 30th day of September 1982

/s/ Stanley C. Feldman
STANLEY C. FELDMAN
Notary Public
My commission Expires on
December 14, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

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NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent.

STATE FARM'S MEMORANDUM IN RESPONSE TO NHTSA'S COMMENTS ON THE SEPTEMBER 1983 EFFECTIVE DATE

Petitioners State Farm Mutual Automobile Insurance Company *et al.* ("State Farm") respectfully submit this memorandum in response to the National Highway Traffic Safety Administration's ("NHTSA") October 1, 1982 memorandum to this Court. In that submission, NHTSA contends that compliance with the passive restraint requirement as of September 1983 is not feasible and that the agency, not this Court,

should determine when the reinstated standard will take effect.

State Farm suggests that the Court withhold ruling on NHTSA's request for delay, pending the Supreme Court's disposition of the petitions for writs of certiorari in this case. When this Court does address NHTSA's request, State Farm submits that, based upon the present record, it should decline to postpone reinstatement of the rule beyond September 1983.

I. THE COURT SHOULD NOT MODIFY ITS ORDER UNTIL THE SUPREME COURT DISPOSES OF THE PETITIONS FOR WRITS OF CERTIORARI

The respondents and several intervenors in this case have petitioned the Supreme Court for writs of certiorari. State Farm is filing its brief in opposition today, and the Court can be expected to rule within a month. NHTSA requests that, after the Supreme Court has ruled on those petitions, the agency should be allowed to set a new effective date for implementation of the passive restraint rule. Like NHTSA, State Farm believes that the present effective date of the passive restraint rule should not be reevaluated until the Supreme Court has disposed of the certiorari petitions. A denial of certiorari will assuage the automakers' concern that their efforts will be wasted if the agency's rescission is upheld. If, on the other hand, the petitions are granted, then NHTSA has indicated that it will seek to stay this Court's rulings in their entirety. A decision now as to the standard's effective date would effectively be nullified if a stay were granted. In either case, therefore, the more efficient course is for this Court to withhold its decision on NHTSA's requests for delay until the Supreme Court has disposed of the certiorari petitions.

State Farm submits that the effective date of the reinstated rule should be determined by this Court, not by NHTSA. NHTSA's insistence that it should set a new effective date for the passive restraint rule rests upon a fundamental misunderstanding of the Court's August 4 order. That order did not direct NHTSA to *adopt* a passive restraint requirement with a

September 1983 effective date. Rather, once NHTSA's rescission of the rule was reversed, the rule was automatically reinstated as it had stood prior to the unlawful rescission. In recognition of the fact that immediate compliance was impossible, the Court stayed enforcement of the rule until September 1983.

NHTSA's argument would make sense if the decision reviewed by this Court had been one postponing the effective date of the passive restraint rule; the appropriate remedy in that situation, following reversal, would have been a remand to NHTSA for redetermination of the effective date. Here, by contrast, the issue is equitable effectuation of the Court's decree restoring the *status quo ante litem;* the arbiter of that decision should be the Court itself, not the losing party.

II. THE COURT SHOULD REJECT ANY ADDITIONAL DELAY BEYOND SEPTEMBER 1983

A person unfamiliar with the twelve-year history of Motor Vehicle Safety Standard 208 would surmise from NHTSA's memorandum that on August 4, 1983, the passive restraint requirement sprang, like Athena, fullblown from the head of Zeus. That is not the case. The motor vehicle manufacturers have been preparing to install automatic seat belts since 1977. When NHTSA postponed the rule in April 1981, the manufacturers were preparing to comply by September 1981—a deadline less than five months away. Yet NHTSA would now have this Court believe that it would take automakers three years, or even longer, to comply with the reinstated standard.

Based upon the present record, the Court should decline to postpone the effective date of the passive restraint rule beyond September 1983. the delay in implementation has already been excessive, and the manufacturers' prophecies of doom are not credible.

A. Implementation Has Already Been Delayed Excessively

This Court is familiar with the delays that have plagued the passive restraint rule since the start of rulemaking proceedings in 1969. Despite those delays, compliance with the rule was at last at hand when NHTSA suddenly postponed the standard on the eve of Model Year 1982 production. NHTSA's April 1981 order pushed back the commencement of implementation from September 1981 to September 1982. And NHTSA's subsequent unlawful rescission of the rule has already resulted in an additional one-year delay in compliance with respect to large- and intermediate-sized cars. In response to this Court's finding that NHTSA acted unlawfully in rescinding the passive restraint rule entirely, NHTSA now seeks to achieve virtually the same result by postponing the effectiveness of the rule from Model Year 1983 to Model Year 1986 or beyond.

Such a delay would be tragically costly in terms of lives lost and injuries suffered. In seeking additional years before it enforces the passive restraint rule, NHTSA has ignored completely the human and economic consequences of further delay. As Professor William D. Nordhaus explained in an affidavit already filed in this case, each year of delay in implementation will result in 6,400 deaths and 120,000 moderate-to-critical injuries that would have been avoided had passive restraints been in place. Each year of delay will result in net economic injury to the nation (beyond the countervailing costs to the automakers) of $2.4 billion. Nordhaus Affidavit, ¶ 3 [attached to State Farm's Memorandum in Support of Motion for a Stay as App. B]. For the convenience of the Court, a copy of the Nordhaus Affidavit is attached hereto.

These are factors that NHTSA, despite its safety mandate, has ignored, but that this Court should weigh against the asserted burdens of complying with the passive restraint rule by September 1983. Implementation of the passive restraint rule is not simply a question of flow charts and sled tests: it is also a question of death, injury, and massive economic loss.

This Court should not tolerate additional delay beyond that already caused by NHTSA's unlawful rescission of the standard.

B. The Court Should Reject The Manufacturers' Lead-Time Estimates

The motor vehicle manufacturers' prophecies of doom should not be surprising. At every turn in the history of the passive restraint rule, the automakers have warned of their absolute inability to comply with whichever deadline approached. But as NHTSA itself recognized a decade ago, the manufacturers' lead-time estimates are based upon "some funding level which they do not plan to exceed": "[w]hen a company says they cannot meet [a target date] . . . they are really saying they cannot meet this date within the funds they have chosen to allocate to th[e] program." C.D. Ferguson, Director of DOT Office of Crashworthiness, NHTSA, Memorandum to the Docket (June 24, 1971). That observation is wholly applicable here: the automakers have established not that installation of passive restraints is impossible by September 1983, but only that it would cost more than they care to expend.

In assessing the automakers' lead-time estimates, the Court should bear in mind the Justice Department's previous observation in defending the passive restraint rule that this case involves "something as simple as seat belts." Brief for the Department of Justice, at 64, *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (6th Cir. 1972). NHTSA's assertion that implementation could not occur for three or more years is simply incredible. Ford and General Motors have stated, for example, that the normal lead time *for completely new vehicles* is only three to three and one-half years. *See* Geschelin, *Lead Time Practices*, Automotive Industries (July 15, 1967), at 60-62. *Cf.* Childs Affidavit (Ford), App. at 5 [attached to MVMA Brief as Ex. C] (development period for new exterior body is 38 months; development period for entirely new vehicle is 5½ years). The automakers' details as to the number of individual parts involved or

the number of tests that occur should not be allowed to make the process appear more complicated than it actually is.

This is not a case of technology-forcing. The automakers may comply with the rule by installing detachable seat belts—the very devices that they claim to prefer. The manufacturers have been preparing to install automatic seat belts since 1977. When NHTSA postponed the rule in April 1981, the automakers were only *five months away* from actual compliance. Yet they now propose elaborate research, development, and testing programs as if these years of preparation had never occurred and as if the installation of automatic seat belts were comparable to the design and building of an entire automobile.

To the extent that the manufacturers cannot simply restart the programs as they stood at the time of rescission, that inability is largely self-inflicted. The automakers began to dismantle their passive restraint programs within hours of the announcement of rescission—many weeks before the rescission order was scheduled to take effect.* *See State Farm Mutual Automobile Insurance Co.* v. *DOT*, 680 F.2d 206, 241 & n.45 (D.C. Cir. 1982) [hereinafter cited as *"State Farm"*]. It now appears that some automakers did not merely scatter the expert employees involved: they "scrapped" or "dispersed" the prototypes, molds, and tools used in the programs. *See e.g.*, Whittenberg Affidavit (General Motors), ¶ 5 [attached to MVMA Stay Opposition as Ex. C] (termination of automatic seat belt program included "the diversion or disposal of engineering test materials and vehicles"); DeCaluwe Affidavit (Chrysler), ¶ 5 [attached to MVMA Stay Oppositions as Ex. E] (delay in reinstating passive belt programs caused in part "by the dispersal of drawings, hardware, data, development cars, equipment"); Whittenberg Affidavit (General Motors), ¶ 5 [attached to MVMA Brief as Ex. E] (one cause of delay is that "much of the hardware . . . has been diverted to other use or

*Although the rescission order was announced on October 23, 1981, its effective date was December 8, 1981.

otherwise disposed of"); Kawano Letter (Toyota) at 3 [attached to NHTSA Oct. 1 Memorandum] ("We have already scrapped the molds, attachments and tools necessary to produce the prototypes, as well as the prototypes themselves. So, in order to restart our automatic belt program, we have to reproduce the molds, attachments and tools necessary to reproduce the prototype itself."); Haenchen Statement (Volkswagen), at 3 [attached to NHTSA Oct. 1 Memorandum] ("finished tools unique to the automatic restraints were disposed of and are no longer available"). The manufacturers should not now be allowed to bootstrap their own pell-mell destruction of the passive restraint programs into a justification for several more years delay.

At every stage in this litigation, the manufacturers' lead-time estimates have grown. In opposing State Farm's motion for a stay in December 1981, several automakers suggested relatively moderate lead-time estimates. For example, Ford indicated in December 1981 that it could install detachable belts by November 1982 and nondetachable belts by September 1983. Childs Affidavit, ¶¶ 5, 7 [attached to MVMA Stay Opposition as Ex. D]. Chrysler, too, indicated that it could begin installing automatic seat belts in November 1982. DeCaluwe Affidavit, ¶ 4 [attached to MVMA Stay Opposition as Ex. E]. In responding to the Court's question on lead time in their brief on the merits, the automakers began to increase the complexity of, and time required for, installation of automatic belts. Chrysler now claimed that it would need over two years lead time. Withrow Affidavit, ¶ 6 [attached to MVMA Brief as Ex. B]. American Motors claimed to need three years. Jones Affidavit, ¶ 4 [attached to MVMA Brief as Ex. A]. The foreign manufacturers claimed to need anywhere from one to four years. Nield Letter, at 2 [attached to MVMA Brief as Ex. F]. Yet, as the Court noted in its June 1 opinion, some of the manufacturers acknowledged that they could install passive restraints after a full model year's lead-time. *State Farm* at 240-41. *See, e.g.*, Childs Affidavit (Ford), ¶ 8 [attached to MVMA Brief as Ex. C] (replacing active belts with passive

belts would take 60 to 67 weeks); Edwards Affidavit (Ford), ¶ 6 [attached to MVMA Brief as Ex. D] (same).

Now, NHTSA claims that "practicable compliance . . . could not be achieved before September 1, 1985 at the earliest" and that "[t]here remains considerable doubt that uniform compliance could *easily* be achieved" even then. NHTSA Memorandum at 8 (emphasis added). Several of the automakers, however, concede that they could install passive belts in less than two years. *See, e.g.*, Horvath Affidavit (General Motors), ¶ 5 [attached to NHTSA Oct. 1 Memorandum] (21 months); Mori Letter (Honda), at 1-2 [attached to NHTSA Oct. 1 Memorandum] (substantial compliance within 24 months); Shapiro Letter (Volvo), at 2 [attached to NHTSA Oct. 1 Memorandum] (24 months). Others represent that they would like up to three to four additional years to comply. *See, e.g.*, Jones Affidavit (American Motors), ¶ 4 [attached to NHTSA Oct. 1 Memorandum] (24 to 36 months); Withrow Affidavit (Chrysler), ¶ 6 (three years after reassembly of staff); Gustavsson Letter (SAAB), at 1 [attached to NHTSA Oct. 1 Memorandum] (four years for passive belts, six years for airbags).

Underlying the manufacturers' estimates is their desire to avoid disruption of their other production goals. *See, e.g.*, Price Affidavit (NHTSA), ¶ 11 [attached to NHTSA Oct. 1 Memorandum]; Ross Affidavit (Ford), ¶ 7 [attached to NHTSA Oct. 1 Memorandum]; Withrow Affidavit (Chrysler), ¶ 7 [attached to NHTSA Oct. 1 Memorandum]. The lead-time issue is, therefore, a question of priorities. Should the automakers devote their resources to installation of lifesaving restraints, or to other vehicular changes, many of which are purely aesthetic? In passing the 1966 Safety Act, Congress directed NHTSA to make safety "the overriding consideration in the issuance of standards," *State Farm* at 209 n.3; and, until now, NHTSA has not allowed the automakers to relegate occupant crash safety to a subordinate position.

NHTSA's submission is not entitled to deference. At every stage in these proceedings, NHTSA has pressed for further delay. Moreover, NHTSA appears not to have exercised *any* judgment (or to have solicited other parties' views) in evaluating the automakers' estimates. It simply accepted those statements without ascertaining the priorities and assumptions that underlie the manufacturers' projections.

Given NHTSA's earlier abdication to the industry's preference for detachable belts, and its postponement of the rule because of the "difficulties of the automobile industry," 46 Fed. Reg. 12,033 (Feb. 12, 1981), this Court may infer that NHTSA's judgment has again "been distorted by solicitude for the economically depressed automobile industry—which is not the agency's mandate—at the expense of consideration of traffic safety, which is." *State Farm* at 240 (footnote omitted). Indeed, *nowhere* in NHTSA's submission is there a *single* mention of the thousands of lives that will be lost if the Court accepts the agency's lead-time recommendation. As before, NHTSA has simply abdicated its statutory responsibilities in favor of the desires of the regulated industry.

CONCLUSION

State Farm urges the Court to withhold ruling on NHTSA's request until after the Supreme Court disposes of the certiorari petitions, and then to reject any additional delay. State Farm recognizes the automakers' assertion that installation of passive restraints by September 1983 might require them to divert resources from endeavors that they prefer to vehicular safety. Those burdens are heavily outweighed, however, by

the human and economic loss that would result from further delay.

Respectfully submitted,

/s/ James F. Fitzpatrick
JAMES F. FITZPATRICK
Michael N. Sohn
John M. Quinn
Merrick B. Garland
Boris Feldman

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for Petitioners
in No. 81-2220

Of Counsel:

DONALD P. MCHUGH, ESQ.
Vice President and General Counsel
State Farm Mutual Automobile
Insurance Company

DATED: October 8, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN FOYD,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as Secretary, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., as Administrator,
Respondents.

CITY OF NEW HAVEN)
) ss.
STATE OF CONNECTICUT)

AFFIDAVIT OF WILLIAM D. NORDHAUS

WILLIAM D. NORDHAUS, being duly sworn, deposes and says:

1. My professional background is the following. I am currently the John Musser Professor of Economics at Yale University, whose faculty I joined in 1967. I received my B.A. in Economics from Yale University in 1963, and my Ph.D. in Economics from M.I.T. in 1967. From 1977 to 1979, I served as a Member of the President's Council of Economic Advisors with responsibilities for regulatory and microeconomic policies. As part of those duties, I organized and served as the first chairman of the Executive Branch Regulatory Analysis Review Group until February 1979. Throughout my professional career, I have conducted a broad range of economic research, including the analysis of costs and benefits of numerous gov-

ernmental policies and regulations. My curriculum vitae is attached to this affidavit.

2. I am completely familiar with the recent Order of the Department of Transportation rescinding requirements for installation of automatic restraints in passenger automobiles. In March and May of this year, I submitted Comments in the rulemaking proceedings which preceded issuance of the automatic restraints order. Those Comments were sponsored by Allstate, Kemper, Nationwide, State Farm, and Travelers Insurance Companies. The views expressed—both in those Comments and in this affidavit—are my personal views and do not necessarily represent the views of any of the aforementioned institutions.

3. The Comment which I filed with the Department of Transportation on May 26, 1981, described in detail the results of an economic cost/benefit analysis which I performed on the scheduled requirements for installation of automatic restraints in large and mid-size cars in Model Year 1983 and small cars in Model Year 1984. A summary of my conclusions is the following:

a. Using the Agency's own data and basic methodology, the automatic restraint requirements, when fully phased in, would have *net* economic benefits of approximately $2.4 billion per year. Cumulatively, the total discounted net societal benefits would be $33 billion.

b. Put another way, rescission of the entire automatic restraint schedule would cost the nation $2.4 billion for every year of delay. The costs of rescission are 3½ times the benefits.

c. In terms of injuries and fatalities, the effect of rescission of the entire automatic restraint standard would be to increase fatalities by approximately 6,400 per year, and increase moderate-to-critical injuries by at least 120,000 per year.

d. The estimated impact of the rescission on the automobile industry is miniscule.

4. The Department of Transportation has now issued an order rescinding the automatic restraint standard, effective December 8, 1981. Given the lead time necessary for implementing so complex a standard, it is clear that if rescission remains effective for even a brief period, the most optimistic result would be that the introduction of automatic crash protection would be delayed for one year for large and intermediate vehicles—even if the Court were later to reverse the rescission.

5. The effect of this kind of delay will be grave and irreparable in terms of life and limb. In my May Comment, I concluded that the consequences of a one year delay of the completely phased in automatic restraint schedule would be an increase in traffic fatalities of 6,400 and an increase in moderate-to-critical injuries of approximately 120,000. When these figures are adjusted to predict the effect of a one year delay for large and intermediate cars alone, the results are 3,000 additional fatalities and 60,000 moderate-to-critical injuries.

6. A delay in implementation would also yield substantial economic costs. One such cost, of course, is the monetary losses the nation would suffer as a consequence of the deaths and injuries discussed in Paragraph 8 below. Another such cost is automobile insurance. In my May Comment, I estimated the additional insurance costs of rescission would be approximately $150 per vehicle over its lifetime. On the basis of this methodology, the cost of a one year delay for both large and intermediate cars would be approximately $750 million. Impacts on insurance costs of this magnitude will have a significant effect on the profits of the automobile insurance industry.

7. By contrast, the benefits to the auto industry of either delay or rescission are miniscule. As I indicated in my May comment, and as NHTSA's own figures reveal, the automakers are likely to raise prices by more than enough to offset the effect of sales on their revenues. Taking intermediate cars as an example, the Agency estimates that in the long-run the

consumer price increase for automatic restraints would be $75 per vehicle. The Agency takes 63% of this to be normal variable cost—indicating a variable cost of around $50 per vehicle. According to the Agency's methodology, the price increases resulting from the standard would more than offset the cost increase, and automakers' profits will rise slightly. While the quantitative effects on automakers' profits cannot be precisely determined, it is my judgment that the effect of the rescission on the health of the auto industry will be negligible. These estimates of long-range impacts on revenues and profits are also reasonable approximations of the effect of a one year delay.

8. In my May Comment, I analyzed the total economic costs and benefits of a one year delay of the entire automatic restraint schedule, and concluded that the *net* economic damage to the nation was approximately $2.4 billion. Adjusting that analysis for a one year delay of large and intermediate cars, the methodology used in my Comment yields a *net* societal cost of over $1 billion.

9. The methods and conclusions in my Comments were in general accepted by the Agency in its Final Regulatory Impact Analysis (October 1981). Although the Agency's conclusions were marred by numerous inconsistencies and errors, the major divergence between the Agency and my Comment lies in their analysis of usage of automatic restraint systems. The Agency's discussion does not disagree with the estimate of usage of current designs of automatic belts given in my Comment; indeed their review of studies of incremental usage shown on page IV-52 shows an increase exactly equal to that in my Comment. Instead, the Agency's case rests on the assertion that automatic belts in the future will be detachable and further that these designs will be completely ineffective. It is my professional judgment that *the Agency's argument on the ineffectiveness of detachable automatic belts is completely without empirical foundation.*

10. I am not familiar with any instance, prior to the present phase of this rulemaking, where as here, a regulatory agency has rescinded a safety standard whose objectives can be achieved by existing designs, solely because portions of the industry have stated that they intend to choose an inferior design that does not achieve the acknowledged regulatory objective. This is particularly disturbing where, as in the present case, the agency is authorized to issue standards which require the industry to develop new technology in furtherance of the safety objectives of its statutory mandate. Rescission of an important health and safety standard on this basis makes a mockery of the process of setting performance standards.

11. Finally, the enormity of the impact of rescission on the nation simply cannot be stressed enough. As I stated in my May Comment,

> "[T]he passive restraint rule is, from an economic point of view, as important as any environmental, health, or safety rule on the books. If the estimates of the impact on fatalities and injuries are accurate, a rescission would be equivalent to repealing a law that cuts in half the homicide rate. It is equivalent to foregoing the medical advances that allowed the virtual elimination of death from tuberculosis over the last quarter century. According to some estimates, it is equivalent to repealing the Clean Air Act."

/s/ William D. Nordhaus
WILLIAM D. NORDHAUS

Subscibed and sworn to before
me this 23rd day of November, 1981

/s/ Paula M. Sadille
PAULA M. SADILLE
Notary Public

My Commission Expires: March 31, 1983.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et. al.*,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent.

STATE FARM'S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO NHTSA'S OCTOBER 1 SUBMISSION

Petitioners State Farm Mutual Automobile Insurance Company *et al.* ("State Farm") submit this supplemental memorandum to bring to the Court's attention a recent report by lead-time analysts of the National Highway Traffic Safety Administration ("NHTSA") that states that about 85% of the automobiles sold in this country could be equipped with passive restraints by September 1, 1984. That information has not previously been brought to the Court's attention, and it bears

directly on NHTSA's recent request that implementation of the passive restraint standard be delayed until September 1, 1985 or even later.

* * *

On October 1, 1982, NHTSA submitted a memorandum to the Court urging that the compliance date of the passive restraint standard be postponed from September 1983 to September 1985. Specifically, NHTSA advised this Court that "practicable compliance with Modified Standard 208 could not be achieved before September 1, 1985 at the earliest" and that "[t]here remains considerable doubt that uniform compliance could easily be achieved even in September of 1985." NHTSA's Memorandum in Response to the Court's August 4, 1982 Order at 8 [hereinafter cited as "NHTSA Memorandum"].

On October 19, Petitioners received a copy of a report by NHTSA's Senior Cost and Lead Time Specialist that sheds important new light on the lead-time issue.[1] The House Subcommittee Chairman who circulated that Report to his Subcommittee described its significance as follows:

> On October 1, 1982, NHTSA asserted to the Court that there is "considerable doubt" that automakers could install automatic crash protection even by model year 1986. NHTSA's assertion contradicts an analysis prepared by

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[1] The Lead Time Report was made available to Petitioners on October 19, 1982, by the office of Congressman Edward J. Markey, a member of the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce. (A copy of the Report is attached hereto as Appendix A.) Congressman Markey received the Report from Chairman Wirth, who distributed it to the Subcommittee, along with a covering memorandum and a copy of correspondence between himself and NHTSA Administrator Raymond Peck. (Copies of that memorandum and exchange of correspondence are attached as Appendices B, C, and D, respectively.)

> the agency's foremost experts in cost and lead time estimates, which concludes that 81% compliance with the standard could be achieved by model year 1985, with full compliance in model year 1986.

Memorandum from The Honorable Timothy E. Wirth to the Subcommittee on Telecommunications, Consumer Protection, and Finance, October 19, 1982 (*see* Appendix B).[2]

Specifically, the NHTSA analysis state that "By September 1, 1984, 6,649,214 [cars] or 85.3 percent of total production could comply [with the passive restraint standard]." *Final Report: Analysis of Manufacturers Comments on the Lead Time Required to Install Automatic Restraints in Cars [FMVSS 208)*, at 1 [hereinafter cited as *"Lead Time Report"]*. The Report goes on to explain:

> This date [September 1, 1984] would be feasible for most cars that would be sold in the U.S. at that time, but would still require significant compression of leadtime schedules for some car lines. Nevertheless, if this were established as the effective date, only a few special car lines would cease being sold in the U.S. for lack of an automatic restraint.

Id. at 24.

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[2] In his October 12 letter to Administrator Peck, Congressman Wirth stated that he had received "several extremely disturbing reports" that agency staff had prepared an analysis of the automakers' lead-time estimates, but that copies of that analysis had been removed from circulation and perhaps destroyed.

On October 15, 1982, Administrator Peck responded to Congressman Wirth's letter, enclosing a copy of the Report. Although Administrator Peck claimed that his staff felt that the report "was not in any way inconsistent with the agency's submission," he nevertheless challenged the accuracy of the Report and sent Congressman Wirth a memorandum that criticized the staff analysis for "bias" and for being "insensitive to the economic consequences of firms' inabilities to comply by a specified date." *See* App. D, Felrice Memorandum.

A fair reading of the NHTSA staff Report leads one to conclude that the agency's proposal for postponement of the effective date of the standard until 1985 is unwarranted. More important, the fact that NHTSA failed to bring to the attention of the Court the technical analysis prepared by its own expert staff dictates that the agency not be afforded judicial deference on the lead-time issue. State Farm continues to believe, for the reasons set forth in its earlier memorandum, that the Court should not resolve that issue until the Supreme Court has disposed of the petitions for writs of certiorari.

The Report's Findings

The Lead Time Report was prepared under the supervision of Dr. Carl E. Nash, Director of the Engineering Systems Staff, by members of NHTSA's Engineering Systems Staff and Cost and Lead Time Staff. The authors of the Report were Charles Westphal, Jr., NHTSA's Senior Cost and Lead Time Specialist, and Richard C. Carter, a Program Analyst. The analysis, which is dated September 1982, is labelled "Final Report" and appears to be in final form (although the word "Draft" has been stamped over the words "Final Draft" on the cover page and on each subsequent page).

In its October 1 submission to this Court, NHTSA asserted that "practicable compliance with Modified Standard 208 could not be achieved before September 1, 1985 at the earliest." NHTSA Memorandum at 1. Yet the accompanying affidavit of NHTSA Associate Administrator Courtney M. Price carefully avoided saying that compliance could not be achieved before 1985; that affidavit merely stated that compliance by September 1983 was "impossible." *See* Price Aff. ¶ 14.

The reason for Associate Administrator Price's refusal to endorse under oath the 1985 deadline is now apparent: NHTSA's own lead-time experts had recognized that, even accepting the automakers' own estimates, substantial compliance was achievable well before that date. Their Lead Time Report summarized the lead-time estimates submitted by

manufacturers who account for 97% of the nation's car sales. It stated that, *based upon the automakers' own estimates*, 85.3% of their cars could comply with the passive restraint rule by September 1, 1984. *Lead Time Report* at 1. It is difficult, if not impossible, to square that statement with NHTSA's assertion to this Court that "any such [compliance] date earlier than 1985 would preclude most if not all manufacturers from producing major car lines." NHTSA Memorandum at 9 n.*.

Nowhere in its October 1 submission did NHTSA apprise the Court of these critical statements from the Lead Time Report. The Price Affidavit makes no reference to when *after* 1983 compliance would be possible. NHTSA's memorandum skips from 1983 to 1985 as if 1984 were not an option — even though the agency's own experts concluded that 85% compliance was possible by that date.

Moreover, the Lead Time Report casts further doubt upon NHTSA's claim that meaningful compliance by 1983 is impossible, as well as upon NHTSA's preferred date of 1985. The Report recognizes that compliance by 1983 "is completely realistic" for cars that already offer automatic seatbelts as standard or optional equipment. *Lead Time Report* at 21. In addition, the staff stated that the 1983 deadline *could* be met for cars "that had completed designs for automatic belts that have been tested and determined to be satisfactory." *Id.* Although the staff felt that this category "would *probably* include only a minority of car lines," they stated that the automakers "did not provide sufficiently detailed information to allow us to estimate the percentage of production for which these conditions hold." *Id.* (emphasis added). Given that the automakers were only five months away from compliance when the standard was postponed in April 1981, and that orders allegedly need to be placed with seatbelt mamufacturers nine months in advance of installation, *see* Price Aff. ¶ 10, it is likely that design and testing were completed for many models in 1981. Indeed, the NHTSA Report acknowledges that, "[f]or many cars, particularly those with wheelbases over 100 inches, designs were completed and at least partially tested. In some

cases, some tooling had been ordered." *Lead Time Report* at 20. Thus, absent the missing information from the automakers, NHTSA cannot reliably state that significant compliance by September 1, 1983 is impossible. And, even as to those cars that do not fall into the foregoing categories, the Report indicated that compliance by September 1, 1984 is possible. *Lead Time Report* at 21.

NHTSA's own lead-time experts thus stated that a September 1984 compliance date "would be feasible for most cars that would be sold in the U.S. at that time," and that "only a few special car lines would cease being sold in the U.S. for lack of an automatic restraint." *Lead Time Report* at 24. Even that analysis accepted the automakers' projections, without addressing whether a reordering of priorities could result in more prompt compliance.

The authors of the Lead Time Report are expert engineering analysts. It was not their responsibility to weigh the consequences of further delay in the standard against the lives that will be lost and serious injuries that will be suffered. The agency, however, has a statutory obligation to accord those consequences great weight. Nevertheless, NHTSA takes the position before this Court that the standard should be delayed for an additional year beyond the date on which its own experts believe substantial compliance is feasible, merely to benefit the tardiest or most recalcitrant members of the industry. This solicitude would require the nation to tolerate 6,400 deaths and 120,000 injuries that might otherwise be avoided. NHTSA's studied avoidance of its primary statutory obligation—to meet the need for motor vehicle safety—and its failure to bring to the attention of this Court its own lead-time experts' analysis

more than justifies this Court in refusing to defer to the agency on the lead-time issue.

Respectfully submitted,

/s/ James F. Fitzpatrick
JAMES F. FITZPATRICK
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Counsel for Petitioners
in No. 81-2220

Of Counsel:

DONALD P. MCHUGH, ESQ.
Vice President and General Counsel
State Farm Mutual Automobile
Insurance Company

DATED: October 20, 1982

APPENDICES TO STATE FARM SUPPLEMENTAL MEMORANDUM

Appendix A: Final Report: Analysis of Manufacturers Comments on the Lead Time Required to Install Automatic Restraints in Cars (FMVSS208)

Appendix B: Memorandum from Chairman Wirth to Subcommittee on Telecommunications, Consumer Protection, and Finance

Appendix C: Letter from Chairman Wirth to Administrator Peck

Appendix D: Letter from Administrator Peck to Chairman Wirth (with attachment)

DRAFT
Final Report

ANALYSIS OF MANUFACTURERS COMMENTS ON THE LEAD TIME REQUIRED TO INSTALL AUTOMATIC RESTRAINTS IN CARS (FMVSS 208)

Charles Westphal, Jr.—Sr. Cost & Lead Time Specialist
Richard C. Carter—Program Analyst

Prepared By

National Highway Traffic Safety Administration
Rulemaking
Engineering Systems Staff
Cost and Lead Time Staff

Dr. Carl E. Nash
Director, Engineering Systems Staff
September 1982

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LEAD TIME FOR IMPLEMENTATION OF THE AUTOMATIC RESTRAINT REQUIREMENTS OF FMVSSS 208

The following report is a summary and analysis of comments on the lead time required to install automatic restraints in new passenger cars. These comments were received from seventeen motor vehicle manufacturers and the American Seat Belt Council in response to letters from the Chief Counsel of the National Highway Traffic Safety Administration (Attachment 1).

The Engineering Systems Staff (ESS) has reviewed and analyzed the comments of the American Seat Belt Council and the seventeen automobile manufacturers that have submitted responses. Assuming a total annual sales volume of 8,046,000 units, these seventeen manufacturers produce approximately 7,799,510 cars annually or 96.9 percent of total sales. To date, nine manufacturers have not submitted comments. These manufacturers produce 246,490 cars annually or 3.1 percent of total annual sales.

We have reviewed the seventeen automobile manufacturers responses regarding their estimated lead time requirements for installing automatic restraint systems on their cars. Table I is a summary of the leadtime requirements estimated by the manufacturers that submitted responses. For the 7,799,510 cars that these manufacturers produce annually they stated that:

1. By September 1, 1983, only 148,851 or 1.9 percent of total production could comply. These are all Volkswagens and Toyotas that presently have automatic belts as an option.
2. By September 1, 1984, 6,649,214 or 85.3 percent of total production could comply.
3. By September 1, 1985, 7,639,677 or 98.0 percent of total production could comply.

4. By September 1, 1986, 7,799,510 or virtually 100 percent of total production could comply.

   Only two manufacturers (Saab and Isuzu) would need an effective date beyond September 1, 1986, Saab for cars it would equip with air bags and Isuzu claims they need 3½ years. Honda said if phase-in within their own model lines is permitted, then (24) months lead time is adequate. Therefore, we have recorded Honda as being able to comply by September 1, 1984.

TABLE I
SUMMARY OF LEAD TIME
EFFECTIVE DATE REQUIREMENTS
(17 MANUFACTURERS)

	9/1983	9/1984	9/1985	9/1986
Percent of Respondents Sales in Compliance	1.9	83.4	12.7	2.0
Cumulative Percent	1.9	85.3	98.0	100
Memo: Percent of sales with no Response from Manufacturer	3.1	3.1	3.1	3.1

	9/1983	9/1984	9/1985	9/1986
Total Sales of Respondents in Compliance	148,851	6,500,363	990,463	160,115
Cumulative Total	148,851	6,649,214	7,639,677	7,799,510
Memo: Did not Respond	246,490	246,490	246,490	246,490

TABLE II

DETAIL SCHEDULE OF LEAD TIME EFFECTIVE DATE REQUIREMENTS[3]

Auto Company	Estimated 1982 Sales	% of Total	1983	1984*	1985*	1986	1987
General Motors	3,508,521	43.61		43.61			
Ford Motor Company	1,379,460	17.14		17.14[1]	17.14[2]		
Chrysler Corporation	685,742	8.52		1.70	6.86		
American Motors	134,201	1.67					
VW of America	92,631	1.15	1.15				
Toyota	544,586	6.77	.45	6.32			
Nissan/Datsun	471,392	5.86		4.69		1.17	
Honda	375,609	4.67		4.67			
Mazda	160,872	1.99			1.99		
Subaru	147,099	1.83			1.83		
Chrysler (Mitsubishi Imports)	107,895	1.34		1.07	.27		
Volvo	82,892	1.03		1.03			
Volkswagen	66,446	.83	.25		.47	.11	
Mercedes-Benz	59,843	.74					

Auto Company	Estimated 1982 Sales	% of Total	1983	1984	1985*	1986	1987
Audi	45,341	.56			.25	.31	
Renault	39,461	.49			.49		
Saab	18,206	.23				.23	
Fiat	17,876	.22					
Peugeot	14,315	.18					
Isuzu	13,763	.17				.17	
Porsche	13,433	.17					
JRT, Inc.	9,125	.11		.11			
Delorean	2,909	.04					
Alfa Romeo	2,015	.03					
Rolls-Royce	2,000	.03					
Others	50,394	.61					
			1.85	63.65 80.79[1]	12.31 29.45[2]	1.99	
	8,046,000						

(1) With no changes in standard.
(2) If standard is changed to require non-detachable belts.
(3) Assuming no unforeseeable problems, and no change in standard.
* Not additive to protect CONFIDENTIAL SUBMISSIONS.

Summaries Of Comments From Individual Automobile Manufacturers

The following are summaries of the comments of the individual manufacturers along with analyses of these comments by the Engineering Systems Staff.

American Seat Belt Council

From the time automobile manufacturers give suppliers a firm design for automatic seat belt systems, it takes approximately nine (9) months to begin supplying belt systems.

In order to meet the September 1, 1983 effective date *for all cars* to be equipped with automatic belt systems, suppliers need the final designs from the automobile manufacturers by October 1, 1982.

To date (September 3, 1982), belt suppliers have not been given any final designs, and believe it would be difficult to meet the September 1, 1983 deadline.

Chrysler Corporation (August 27, 1982)

Chrysler cannot meet a September 1, 1983, effective date. If that effective date is retained, it will be forced to discontinue passenger car production up to two years.

The earliest Chrysler will be able to provide any detachable automatic seat belts is September 1, 1984, and then only on its E-body vehicles that have a wheelbase over 100 inches, and possibly a portion of one other car line. The earliest Chrysler will be able to incorporate detachable automatic

seat belts on its remaining lines of vehicles is September 1, 1985.

Chrysler would be unable to survive the production disruption caused by retention of the September 1, 1983, effective date. It also would be unable to survive the production disruption caused by a September 1, 1984, effective date.

Requiring compliance on vehicles with a wheelbase over 100 inches by September 1, 1983, would force Chrysler to delay the scheduled introduction of a new line of vehicles for one model year.

The lead times discussed above are greater than Chrysler detailed in its January 22, 1982, affidavit filed with the United States Circuit of Appeals for the District of Columbia circuit. Additional knowledge gained since that affidavit was prepared, as well as other developments since then, lead the company to conclude that those lead time projections are no longer valid.

Examples of items of additional knowledge gained and developments since the affidavit was prepared that require longer lead time are:

— Chrysler now recognizes that it will take considerably longer to procure prototype instrument panels constructed with representative materials for testing purposes.

— When FMVSS 208 was rescinded Chrysler could use ear-

ly production tooling for E-body development work. Now that the E-body is in production, additional tooling will be required to provide new prototype parts for testing.

Chrysler now recognizes that separate manual belt production tooling will be required for export and Canadian markets.

Chrysler now believes that substantially more developmental testing is required to give adequate assurance of system compliance. The earlier estimate was based on the results of successful frontal impacts. More recent testing of imported cars indicates that additional work will be required for compliance in angular impact situations.

Product improvement programs instituted since January, such as the redesign of steering columns on passenger cars for 1986 model year to reduce vehicle weight, and the fact Chrysler is introducing three new car lines (one in 1985 model year and two in 1986 model year) will require a significant increase in development testing.

Ford Motor Company
(September 16, 1982)

Ford cannot meet the Court ordered effective date of September 1, 1983. If the September 1, 1983, effective date is retained, it is possible that Ford might be required to suspend passenger car production or to give up critically

important new passenger car product programs.

If Ford were free of all other constraints and the standard were not changed, such as to provide detachability of automatic belt systems or to provide air bags, with an accelerated effort, Ford could comply by September 1, 1984. However, an effective date of September 1, 1985 compliance would allow more orderly and efficient implementation.

Ford views the September 1, 1984, effective date as not practicable because of the severe cost penalties caused by an accelerated program and the manpower resources that would have to be reassigned from other priority product programs, some of which would have to be dropped or delayed.

Ford believes that a reasonably orderly and relatively efficient program to introduce passive belts on substantially all of their North American passenger car lines could be completed in time for a Job No. 1 date four to six weeks before September 1, 1985.

General Motors Corporation

General Motors is unable to meet the passive restraint rule by September 1, 1983. The effects of the disruption in production on General Motors, its suppliers, and employees will be catastrophic.

Assuming the performance requirements of FMVSS 208 are

identical to those in the Standard prior to rescission, General Motors requires a minimum lead time period of twenty-one (21) months. To avoid a complete, second shut down (in addition to the normal model change-over) to launch the automatic belts prior to the normal schedule model change over down time, a September 1, 1984 effective date is desired.

General Motors emphasizes that the changes required to incorporate automatic belt systems are substantial and could not be reasonably accomplished during production. Therefore to avoid a complete, second shut down for two to three weeks at a time other than the normal model change-over, a September 1, effective date, is necessary, whatever the year of implementation.

If other designs such as air bags and/or non detachable automatic seat belts, were to be required, a complete redesign of General Motors' restraint systems would be required. Such a redesign could invalidate the projected 21 months leadtime, and would result in the loss of any portion of our investment of which General Motors would be unable to apply to any redesigned passive restraint system. They currently estimate that this investment will be $375 million. For example, the adoption of an air bag's only requirement could result in the loss of virtually all of the $375 million.

Mitsubishi Motors Corporation
(September 3, 1982)

Mitsubishi needs a 24-month leadtime in order to equip the kinds of vehicles that it is now producing and it will be producing through the 1983 model year, with automatic seatbelt systems that would meet the requirements specified in FMVSS 208.

Mitsubishi believes that a 36-month leadtime is necessary for them to equip vehicles that it will produce after September 1983.

The above 12-month difference in lead times arises from the fact that, in December 1981, Mitsubishi had undertaken only preliminary development work on an automatic seatbelt system for its post-September 1983 production vehicles.

Renault, U.S.A.
(August 24, 1982)

Renault needs thirty (30) months of lead time for automatic restraints from the time when this litigation has been clearly and definitively resolved by the Courts.

Any automatic restraint introduction should coincide with the start of a September 1st, new model year.

According to Renault, when the requirement was rescinded on October 23, 1981, a two-year lead time remained before passive restraints would have had to be installed in its vehicles. To revive and complete the development of these systems and to tool up for production, it would be necessary

to give them two years' lead time, in addition to a six-month start up period.

Isuzu Motors, Limited
(August 31, 1982)

Isuzu needs 3½ years after the requirement has been re-established.

Unlike active belts, passive belts require substantial changes to the vehicle interior layout including modification to the vehicle body structure.

A great number of crash tests are necessary to make sure that the vehicle meets all performance requirements.

Isuzu, relatively small as an automobile manufacturer, does not have sufficient manpower, test facilities, and other resources to develop more quickly the passive restraint system as an integral part of the vehicle.

Isuzu needs a minimum of 3-year lead time to develop such a system for one model having only one body style. However, more than one model is involved in its program and its ability to proceed with development and production preparation simultaneously for two or more vehicle models is very limited. Therefore, 3½ year lead time is needed.

THIS PAGE EXCLUDES INFORMATION SUBMITTED AS CONFIDENTIAL

BMW of North America (August 24, 1982) and (September 17, 1982)	(Data submitted with claim that it is entitled to CONFIDENTIAL TREATMENT).

THIS PAGE EXCLUDES INFORMATION SUBMITTED AS CONFIDENTIAL

Nissan Motor Co., LTD.	Nissan cannot meet the September 1, 1983, effective date. For current models where passive restraint systems development was in progress prior to the rescission, Nissan projects that twenty-three (23) months of lead time is required. For the new models that have been developed since the rescission, where no provision was made for automatic restraints, Nissan projects that a 30-month lead time would be required. For these new models, it will be necessary to change the interior design: both the basic design concept and the details. Nissan did not indicate the number of current and new models involved in their total production.
Rolls-Royce Motors (September 8, 1982)	Rolls-Royce Motors estimates it would require an effective date 31 months after the final rule is issued. Leadtimes have been extended from previous estimates because

	resources have been engaged on other work.
Jaguar Cars, LTD. (September 6, 1982)	Jaguar requests that NHTSA persuade the U.S. Court of Appeals that the effective date be deferred until January 1984. According to Jaguar, if the effective date remains at September 1, 1983, then either sales to the United States market will have to be discontinued, or the company will be required to introduce into the market systems that have not been tested sufficiently.
Saab-Scandia (September 10, 1982)	Saab proposes that passive belts not be required before September 1, 1986 and that air bags not be required before September 1, 1988.
Mazda (North America) Inc.	Minimum lead time needed is thirty-one (31) months. To reduce cost burdens, introduction of automatic belt systems must coincide with new model introduction. Mazda suspended development on automatic belt systems when the mandatory requirement of the system was rescinded. Subsequent to rescission of the requirement, design features on each vehicle model were changed without making provision for the installation of the automatic belt system.

The long lead time required is attributed to the following:

1. Designs intended for implementation before the rescission of the standard must be reviewed.

2. Modifications must be incorporated to reflect new technology.

3. Engineering drawings must again be released.

4. Arrangements and contracts with suppliers must be negotiated.

Volkswagen of America, Inc. (September 1, 1982)

Automatic belt systems are currently offered as optional equipment on the Rabbit and Jetta models; therefore, those models could comply by September 1, 1983.

On the remaining models Volkswagen discontinued automatic belt system development after the rescission. For Volkswagen's remaining models the following effective dates could be met:

- July 1, 1985: VW Quantum, Audi 4000, Audi Coupe, Audi Quattro, and VW Scirocco.

- January 1986: Audi 5000, VW Rabbit Convertible. Note that the situation regarding these models is a special one, requiring unique automatic restraint systems because of their different door configura-

tion. Accordingly, VW has determined that compliance for these models cannot be completed until January 1986.

Volvo of America Corporation

Volvo requests a lead time of at least twenty four (24) months (September 1, 1984) in order for the company to be able to comply with passive restraints requirements for all its vehicles. Also, they would prefer an additional 12 months (that is, an effective date of September 1, 1985) in order to have a margin for unforeseeable events.

Volvo cited several reasons why it cannot comply with the passive restraint requirements by September 1, 1983. The primary reasons are:

1. Prior to FMVSS being rescinded the Volvo automatic restraints plans were for an air bag system for the top-of-the-line models and automatic belt systems for other models.

2. If passive restraint systems are again required, Volvo would prefer to replace its original automatic belt system with later generation systems in order to improve comfort and convenience to increase usage rates. The new systems may also incorporate a spool release system instead of the previous buckle-type emergency release. This requires additional component testing and crash testing to

verify the occupant protection properties of the new systems.

3. When FMVSS 208 was rescinded on October 29, 1981, Volvo immediately stopped all work on the development of passive restraint systems.

4. Since the FMVSS was rescinded Volvo has developed some new models for which no automatic restraints were developed. For those models, development must start from scratch. However, it may be possible to use some components from other models.

Toyota Motor Corporation (September 15, 1982)

Except for the Cressida model which is already equipped with automatic belts Toyota cannot meet the September 1, 1983, Court ordered effective date.

For the current production models other than the Cressida with wheel bases of more than 100 inches and all cars with wheel bases under 100 inches it is possible for Toyota to comply with the automatic belts by September 1, 1984, though it would entail serious difficulties.

For those car lines with wheelbases of 100 inches or less, the development and tooling program of automatic belts was at a very preliminary stage (by more than one year), compared with the program of the current production models with wheelbases of more than 100 inches. Moreover, since

they have many car lines with wheelbase ranges of 100 inches or less, it is virtually impossible to carry out these extensive changes for those various car lines within the same time frame. Thus, none of these vehicles with wheelbases of 100 inches or less could be equipped with automatic belts earlier than 1985 models, and not even then for some car lines. Approximately 90 percent of Toyota's vehicles are in the 100 inch or less wheelbase class.

For the current production models with wheelbases of more than 100 inches, it would be impossible to adopt the automatic belts starting with 1985 models, though it would entail serious difficulties, except for the Cressida which is already so equipped. At the time of NHTSA's rescission order, development and tooling processes for models to be introduced to the United States or completely redesigned after September 1, 1982, were halted at a more preliminary stage than the current production models. After the rescission order, the body structure of these new vehicles was changed to incorporate manual belt systems, only, and tooling for production has been committed. To install automatic belts, it is necessary to modify the already completed development and tooling program for the manual belt system, for which there is now insufficient time.

As explained above, none of Toyota's 1984 models can be equipped with automatic belts, with the exception of the Cressida which is already being offered with automatic belts.

Since they cannot comply with the automatic restraint requirements, except with the Cressida, their total sales would be limited significantly. This would have a devastating effect on their United States market, which would cause extreme financial repercussions not only for Toyota, but also for our United States dealers and for their employees.

Honda Motor Company, LTD. (September 15, 1982)

It would be impossible for Honda to have 1984 year models comply with the previous requirements by September 1, 1983. That is, considering the period required for developments and retooling.

They would be able to produce certain models that conform to the requirements, however, starting with the 1985 model year.

Honda anticipates their lead time requirements are:

(1) 36 months, or starting with 1986 model year, if one effective date is set for all passenger cars.

(2) 24 months, or starting with 1985 model year, if NHTSA allows manufacturers to

phase-in automatic restraints within their model line-up.

Note: One effective date for all passenger cars would not prohibit Honda from phasing-in automatic restraints within their own models. Therefore, (24) months, or a September 1, 1984, effective date appears adequate for Honda.

Subaru of America, Inc. (September 21, 1982)

Subaru cannot meet the September 1, 1983, effective date. The effects of the disruption in production on SOA and FHI, their suppliers, distributors, dealers and employees would be catastrophic.

As an absolute minimum, Subaru requires 36 months lead time for current and planned models. That is, assuming the performance requirements are identical to those in the standard prior to rescission.

Lead time explanation:

(1) *Current models*

At the time of the October 23, 1981 rescission, 22 months lead time remained for implementing the detachable automatic seat belts, i.e., September 1, 1983. At that time they stopped all passive restraint development. In order to regenerate these activities, reassembling of engineering technology and reorganization of develop-

ment teams are necessary, requiring six (6) months for a total lead time for current models of 28 months.

(2) *For new models*

(36) months lead time is needed. Explanation of why were provided in the September 21, 1982 letter on a CONFIDENTIAL basis.

Even with the curtailing and cancellation of other important engineering projects, they can not resume developmental activities for detachable automatic seat belts until January 1983. During this period all of their available engineering manpower is occupied with projects which are essential to their very survival in the marketplace. Therefore, it is impossible for them to comply with the re-established standard for 36 months.

GENERAL DISCUSSION

Before the automatic restraint requirements of FMVSS 208 were rescinded, the implementation schedule for the standard was as follows:

- For cars with wheelbases over 100 inches, September 1, 1982, and
- For cars with wheelbases under 100 inches, September 1, 1983.

For many cars, particularly those with wheelbases over 100 inches, designs were completed and at least partially tested. In some cases, some tooling had been ordered. However, for the year preceeding the rescission, many manufacturers slowed

their programs in anticipation that the government would rescind or modify the automatic restraint requirements.

Despite the fact that there had been considerable development work on automatic belts for new cars, many companies commented that they would like to redesign their automatic belt systems if they were required to install them in new cars in the future.

The leadtime required by seat belt manufacturers, from the time they receive final designs from the automobile companies until they begin production is normally six to nine months. An additional two months is required before these systems can be installed on automobile production lines. However, if new belt systems must be produced for all cars being sold in the U.S., in the same model year, manpower and other scheduling problems will make additional leadtime necessary, or will force costs up substantially.

Compressing leadtime also affects the design and production quality of the belts that will be produced. An example of this effect was the the implementation of the present safety belt requirements plus the interlock requirement in the 1974 model year. Less than two years leadtime was allowed to incorporate automatic locking retractors in lap belts and either webbing sensitive to inertial locking retractors in shoulder belts, and to include starter interlock devices to ensure usage of belts. As a consequence, there were many design deficiencies in these new belts, as well as quality problems in their production that affected their performance and consumer acceptability. These problems exacerbated the negative reaction of some parts of the public to the starter interlock system.

The Engineering Systems Staff makes the following estimates of the overall leadtime required for individual car lines to meet an automatic restraint requirement.

- For cars that now have automatic belts as standard or optional equipment, such as the VW Rabbit and the Toyota Cressida, the effective date of the standard set

by the Court, September 1, 1983, is completely realistic.

- For cars that had completed designs for automatic belts that have been tested and determined to be satisfactory by the manufacturers for those cars, the present effective date could also be met. This would probably include only a minority of car lines being sold in the U.S. at present. However, the automobile manufacturers did not provide sufficiently detailed information to allow us to estimate the percentage of production for which these conditions hold.
- For cars where preliminary design work for automatic restraints has been completed, and where some cosideration had been given to the need for installing automatic belts in the original vehicle design, two years of leadtime should be sufficient in most cases. For these cars, an effective date of September 1, 1984, should be feasible.
- For cars on which there has been no design work, and for which no provision has been made for automatic restraints, a minimum of two years leadtime is necessary, and three years would be highly desirable. Thus, for these cars, an effective date of September 1, 1985, would be desirable. If a substantial number of car lines fall into this category (and the comments of the auto makers indicates that they do), scheduling and manpower constraints would make a two year leadtime very difficult and expensive, and would probably result in design and production quality problems with the new belts.

Two additional technical factors should be considered:

- For systems that use a knee bolster, such as the VW and Toyota systems, the redesign of the instrument panel would require additional leadtime. Typically, new instrument panels have a leadtime of two to three years, and such modifications would take about two years of lead time depending on the extent of the changes required.
- For companies that choose to use air bags to comply with the standard, a minimum of three years of leadtime would be very desirable, if not necessary. There

are no suppliers presently able to produce large quantities of inflators and other sophisticated components for air bag systems. Furthermore, these systems require substantial developmental testing which is very time consuming. At present, it appears that Ford, Mercedes Benz, and BMW have developed air bag systems for at least some of their car lines that could be put into production in less than three years, but none of these companies commented on this possibility.

The NHTSA believes that the availability of a substantial number of new cars with reasonably priced air bags would enhance public acceptance of the automatic restraint standard. A leadtime of significantly more than three years, as well as a major industry commitment to producing cars with air bags would be necessary for this to occur.

DISCUSSION OF PARTICULAR IMPLEMENTATION SCHEDULES

A number of automobile manufacturers stated that regardless of the implementation date, an effective date of September 1 of the year in which the standard takes effect is highly desirable. Such an effective date would allow the change to automatic restraints to be made during the normal model changeover period.

The automatic restraint standard promulgated in 1977 had a phased introduction with four to six years of leadtime. The basis for determining the effective date of the standard was the size of the passenger car as measured by its wheelbase. Large cars were given four years of leadtime. Mid-size cars were provided five years, and small cars had six years.

At present, unfortunately, there is no simple scheme by which cars could be classified by type (as is permitted in the National Traffic and Motor Vehicle Safety Act) that would accomodate the manufacturers' lead time needs. Thus, for leadtimes of less than two years, the Engineering Systems Staff does not believe that a phased introduction schedule is feasible.

The following is a discussion of effective dates for all cars sold in the U.S.

September 1, 1983

This date is highly unrealistic for all cars to be sold in the U.S. as was recognized as a possibility by the Court. While it would be possible for many auto companies to meet this effective date for some of their car lines under emergency conditions, it would be very expensive and would result in poor quality belt systems that would be likely to be rejected by the public.

Because of the substantially depressed new car market, and the poor financial condition of many auto makers, it is possible that at least some companies could not survive the impact of substantial extraordinary costs for belt development and tooling, and of consumer rejection of the belts so produced.

There is also no single type of passenger car that could be defined for which this effective date is feasible for all cars of that type.

September 1, 1984

This date would be feasible for most cars that would be sold in the U.S. at that time, but would still require significant compression of leadtime schedules for some car lines. Nevertheless, if this were established as the effective date, only a few special car lines would cease being sold in the U.S. for lack of an automatic restraint. On the other hand, the compression of schedules would result in significant cost increases for the belt systems in some car lines. It would also mean that for some car lines, the belts would not be those considered optimal by the manufacturers for both safety performance and consumer acceptance.

September 1, 1985

The advantages of setting the effective date with nearly three years of leadtime are basically three: 1) it would eliminate virtually all compression of schedules for the development and tooling for automatic restraint production, 2) it would result in higher quality restraint systems (including the distinct possibility that some manufacturers would use air bags to comply with the standard), and 3) it would save some costs for install-

ing automatic restraints in car lines that will be phased out over the next three years.

By eliminating the compression of lead times, the cost of implementing the standard would be minimized. Manufacturers would also not be forced the divert scarce skilled manpower from other projects to accelerated restraint development programs. This schedule would also reduce the scheduling problems with sled and crash test facilities needed for developmental and compliance certification testing.

Many manufacturers stated that they would change their automatic belt designs from those they had intended to use to meet the original deadlines set in 1977, to improve their safety, comfort, convenience, and public acceptability. However, with less than three years of lead time, many would be forced to use existing designs rather than newer designs that would be superior.

Finally, there are several car lines that are likely to be phased out of production over the next three years, such as the full sized rear-wheel drive cars of the major manufacturers. If the effective date of the standard is set less than three years in the future, the manufacturers would either have to end production prematurely, or would have to equip these cars with automatic restraints for a very small production run, making them very costly.

U.S. House of Representatives

SUBCOMMITTEE ON TELECOMMUNICATIONS,
CONSUMER PROTECTION, AND FINANCE
OF THE
COMMITTEE ON ENERGY AND COMMERCE
Washington, D.C. 20515

October 19, 1982

TO: Members, Subcommittee on Telecommunications, Consumer Protection and Finance

FR: Timothy E. Wirth, Chairman

RE: Recent developments concerning Federal Motor Vehicle Safety Standard 208, the automatic crash protection standard.

As you recall, NHTSA rescinded standard 208 in October, 1981 which would have required automakers to equip cars with automatic crash protection (air bags, or automatic seat belts). Soon afterward, several insurance companies joined by the United Auto Workers and public health and consumer groups filed a lawsuit against the agency in the U.S. Court of Appeals for the D.C. Circuit. In June 1982, this court remanded the case to the agency, stating that the rescission of the automatic crash protection standard was "arbitrary and capricious" and "unlawful." Subsequently, the court reinstated the standard to be effective on September 1, 1983 (the beginning of the 1984 model year). The court also asked NHTSA to submit additional comments concerning the feasibility of automakers complying with the standard by that date.

On October 1, 1982, NHTSA asserted to the Court that there is "considerable doubt" that automakers could install automatic crash protection even by model year 1986. NHTSA's assertion contradicts an analysis prepared by the agency's foremost experts in cost and lead time estimates, which concludes that 81% compliance with the standard could be achieved by model year 1985, with full compliance in model year 1986.

For your interest and information, I am including my correspondence with NHTSA Administrator Peck on the lead-time question, his responses, and a copy of the memo done by the cost and lead-time experts. I believe these documents warrant your attention as they will undoubtedly be part of the Subcommittee's future oversight efforts.

U.S. House of Representatives

SUBCOMMITTEE ON TELECOMMUNICATIONS,
CONSUMER PROTECTION, AND FINANCE
OF THE
COMMITTEE ON ENERGY AND COMMERCE
Washington, D.C. 20515

October 12, 1982

Mr. Raymond Peck
NHTSA
400 Seventh Street, S.W.
Room 5220
Washington, D.C. 20037

Dear Ray:

I have had several extremely disturbing reports in recent days concerning NHTSA's handling of its review of the estimates given by various automobile manufacturers of the lead-time necessary before they can install automatic crash protection in compliance with FMVSS 208. I am aware that the agency, in response to an order of the United States Court of Appeals on August 4, 1982, sought information concerning the lead-time requirements from the manufacturers and that the agency later set forth its own views on the subject in a submission to the Court on October 1, 1982.

I have recently been told that employees of the Office of Rulemaking (or other personnel of the agency) prepared a summary and an analysis of the comments submitted to the agency by the automakers on the lead-time question. I am also informed that one (or more) such document (s) was removed from circulation within the agency, retrieved from employees who had received it by employees of the Office of General Counsel or of your office and, perhaps, destroyed.

I am sure you can understand my dismay at these reports. I will very much appreciate hearing from you as to the circumstances surrounding the preparation, collection or destruction

of any NHTSA document prepared in connection with the manufacturers' submissions on the lead-time question. If any such document is in existence at this time, I will appreciate receiving a copy.

Inasmuch as this matter is presently in litigation and in view of the serious nature of the reports I have had, I would like to hear from you no later than close of business on Thursday, October 14, 1982.

Many thanks for your cooperation.

With best wishes,

Sincerely yours,

/s/ Timothy E. Wirth
TIMOTHY E. WIRTH
Chairman

U.S. Department
of Transportation

National Highway
Traffic Safety
Administration

October 15, 1982

The Honorable Timothy E. Wirth
Chairman, Subcommittee on Telecommunications,
Consumer Protection, and Finance of the
Committee on Energy and Commerce
Washington, D.C. 20515

Dear Mr. Chairman:

I share fully your concern over the false reports you have apparently received over the handling by the National Highway Traffic Safety Administration (NHTSA) of its response to the question addressed to us by the U.S. Court of Appeals for the District of Columbia Circuit as to whether the compliance date of September 1, 1983, set by the Court is "achievable" or "whether a longer period is necessary."

Based on my personal knowledge of the events surrounding NHTSA's court submission, there is no substance to the allegation you have apparently received that material prepared by NHTSA in connection with this litigation was improperly "removed from circulation" within the agency, destroyed or otherwise not taken into account in the preparation of our submission to the Court.

All data prepared or collected by the agency was given to and used by our Counsel in preparing our response. The Rulemaking Office prepared and assisted in the preparation of the affidavit of Mrs. Courtney Price, the Associate Administrator for Rulemaking dated September 30 and submitted to the Court on October 1, 1982. This affidavit summarizes and sets forth the agency's conclusions derived both from agency knowledge and industry submissions, indicates the basis for such conclusions, and submits to the Court copies of all industry submissions in response to our request for further information. I enclose a copy of this submission for your information.

Internally, the agency and the various offices involved prepared successive drafts of a number of documents which, in your words, summarized and analyzed manufacturers' lead-time submissions. As more data was received, each such draft was updated and revised, but Counsel's office was kept informed on a current basis of all such revisions.

I believe I know the origin of the report you received, and am sure you will share our concern and endorse our action. Briefly, sometime after 5:00 p.m. on October 1, and after our response to the Court had been delivered, a document was hand carried to the Office of Chief Counsel from the Rulemaking Office. As delivered, it did not resemble in format anything previously submitted by that Office to Counsel. Staff having left for the day, the Chief Counsel was unable to confirm what the status of the document was and, more importantly, whether it represented new or additional material that should be taken into account in our response to the Court. Although the internal agency deadline for analytic data of this nature had long since

passed, it was clear that if, in fact, this represented new information a supplementary or revised filing with the Court could have been necessary.

To determine whether this was the case, Chief Counsel Frank Berndt called Dr. Carl Nash, Deputy Associate Administrator for Rulemaking and Director of the Engineering Systems Staff. Mr. Berndt asked for the background of the paper and the information or analysis upon which it was based. Dr. Nash responded by bringing Mr. Berndt his file on the subject, including earlier drafts. In my view this was fully appropriate and indeed necessary, for the document in no way resembled any customary format of NHTSA analysis. We do not customarily prepare any such type of document. It bore no indication of source of origin within the relevant NHTSA staffs. It was "delivered" or rather appeared without any letter or memorandum of transmittal, no review or clearance sheets, no dates or routes of transmission, and no indication that it had been seen, reviewed or even given to any of the offices involved in our response effort.

Most disconcerting of all was the fact that the cover sheet bore the phrase "September 1982," an indication on its face that the paper might, in fact, have been in existence before the date of delivery but never brought to the attention of the draftsmen of our response.

Mr. Berndt brought the paper to me, and I discussed it at length with Mr. Berndt, Dr. Nash and the Deputy Administrator. On examination of the document, Dr. Nash was able to assure us that it was not, in fact, new, was not in any way inconsistent with the agency's submission, and had been appropriately considered throughout the preparation of our response. He reminded us that he had participated in drafting and had personally reviewed in detail Mrs. Price's affidavit, and had fully concurred in all but one minor point, on which he readily agreed anyone could differ. (Specifically, he had suggested that it might literally be inaccurate to describe compliance by September 1, 1983, as "impossible," since on a war

time, crash basis, with substantial assistance from the Government or otherwise outside the industry and by eliminating many future lines of cars, some form of partial compliance could possibly be achieved.)

Dr. Nash noted that no consultation with other offices had occurred in drafting, and that no supplementary data had been sought or obtained by his staff from the industry or any other sources. He was unable to explain why the document had come to be prepared in that precise format, and had not known of or concurred in its transmittal to Counsel.

My initial reaction had been to ask Dr. Nash and his staff for an affidavit suitable for submission to the Court and setting forth how, on an issue of this importance, a "Report" of his office could be tendered so late as not to be able to be taken into account in preparing our submission. In light of his assurance that that document was not new or inconsistent in any way with our submission, and had previously been considered by Counsel, I withdrew that request.

Since, however, the document had, in fact, been transmitted by an office of NHTSA to another office, and since in our discussion Dr. Nash and I had identified but not been able to resolve some apparent inconsistencies appearing on the face of the document, I directed that normal agency policy be followed in all respects and other interested offices review and comment on this office's draft. This review has identified several major problems with the analysis. Some involve the previously identified inconsistencies, others inaccurate characterizations of the submissions themselves. Each of these problems is apparent on the face of the document. In addition, however, it would appear that the authors were either unaware of or failed to take into account collateral issues and resource needs that would render at least some of the judgments derived insupportable in fact. In view of the nature of your request and interest, I enclose a copy of one such review already received.

I do not believe any fair construction of these events could lead to the apprehensions apparently voiced by your reporters. As

you know, I am particularly sensitive to any such implications, because of the unfortunate confusion that arose last year over the status of a similar unreviewed, untransmitted draft document. I assure you that our review of this issue has been thorough and comprehensive, and directed to the need to be as fully and completely responsive to the issues raised in the proceeding and by the Court.

Please do not hesitate to contact me or my staff if you have any further questions about this issue.

Sincerely,

/s/ Ray Peck
Administrator

U.S. Department
of Transportation

National Highway
Traffic Safety
Administration

Date: October 6, 1982

Subject: *INFORMATION:* Review of "Lead Time for Implementation of the Automatic Restraint Requirements of FMVSS 208"

From: Barry Felrice
Associate Administrator for Plans and Programs

To: Raymond A. Peck, Jr.
National Highway Traffic Safety Administrator

Reply to
Attn. of: Felrice: 61560

I have reviewed the "Report" on lead time for implementation of the automatic occupant protection requirements of FMVSS 208 and find it seriously deficient in several respects. First, it

erroneously discusses compliance dates in terms of how many vehicles could comply while also implying that a phased-in schedule (i.e., not requiring simultaneous implementation for all cars) is not possible. This one dimensional discussion could lead a reader to believe incorrectly that compliance by 85 percent of all cars by 9/1/84 somehow can be effected, or would be lawful when indeed no such result could be acceptable in accordance with the National Traffic and Motor Vehicle Safety Act. Thus, the principle thrust of the entire paper is a straw-man and should be recognized as such.

Second, the discussion of what percent of cars could comply by a certain date fails to recognize the practical effects such dates entail. For instance, the paper claims in one place that 85 percent, and in another 81 percent, of all cars could comply by 9/1/84, but this represents in each case the full production runs of only four companies—GM, Ford, Volvo, and Jaguar. No other company could meet such a date for all its vehicles. Thus, the competitive effects of a 9/1/84 compliance date would be catastrophic. It would be equivalent to the government wiping out competition in the auto industry so as to make the strong stronger. Indeed, it is only the largest companies (GM, Ford, Chrysler, Toyota, Honda) that could hope to meet such a date even with a portion of their production.

Third, the paper glosses over virtually all of the caveats accompanying the manufacturers' statements. It ignores the company concerns over the ability of suppliers to meet their deadlines, it ignores the possibility that testing and development might uncover problems, and it even ignores company claims about compliance dates for currently produced cars and assumes to-be-produced models can so comply. These comments are enlarged upon in the attachment to this memorandum.

Honda

The summary contains a note that a 9/1/84 effective date "appears adequate for Honda." This statement is totally without basis in Honda's submission. Honda stated that it could

produce "certain models" which would conform to 208 by 9/1/84 but could not achieve 100 percent compliance until 9/1/85. Their discussion of phase-in must be interpreted to mean that cars with >100 inch wheel-base could comply by 9/1/84 but cars with <100 inch wheelbase would need 1 more year.

Jaguar

The summary makes no mention that the United States is Jaguar's largest single market, thus of "overwhelming importance to the company."

Rolls Royce

The summary fails to mention that the U.S. market "is vital to the survival of [the] company."

VW

VW's summary takes no notice of VW's concern over its suppliers' ability to meet its deadlines. VW anticipates that its suppliers will be reluctant to commit their resources to passive restraint development. VW is also concerned that any departure from their schedule would compromise the quality of their restraint systems.

Volvo

Volvo also mentioned supplier problems and cited that it already had "indications that some vendors may need additional lead time" thus calling in jeopardy their 9/1/84 estimate. The summary also fails to mention that their estimate assumed one "testing loop" in their development work but their experience shows that at least two "loops" are usually required to meet reliability and performance goals.

Alfa-Romeo

No summary is presented. Alfa-Romeo requires until 9/1/85.

American Motors

No summary is provided. AMC requires until 9/1/85.

BMW

No summary is provided. BMW requires until 9/1/85 working on a "crash" basis. Any earlier date and they would preproduce and stockpile manual belt cars, which would be "extremely expensive" and would injure its dealer network.

FURTHER COMMENTS ON "LEAD TIME FOR IMPLEMENTATION OF THE AUTOMATIC RESTRAINT REQUIREMENTS OF FMVSS 208"

Chrysler

The summary of Chrysler's comments fails to mention several key points. First, Chrysler continually emphasized that the *earliest* date by which it could comply for all models is 9/1/85. This point is glossed over in the summary. Second, Chrysler stated (p 14 of its submission) that even the 9/1/85 date "would have a substantial adverse impact on Chrysler's ability to incorporate improvements in its vehicles that are responsive to other public needs such as fuel economy and to its competitive position." For a corporation such as Chrysler where maintenance of market share is crucial to survival, any significant dimunition of engineering effort in developing new products must be carefully weighed. Third, Chrysler's estimates are dependent on the standard remaining unchanged. Any alteration could lead to additional lead time being required. And, fourth, Chrysler estimated that even a 9/1/84 date would lead to losses of $2-$5 billion in revenue and $0.7-$1.6 billion in profits, amounts which would lead to the eventual collapse of Chrysler.

Ford

The summary of Ford's submission leads one to believe that Ford claimed it could meet a 9/1/84 effective date, but preferred a 9/1/85 date. However, a careful reading of their submission shows that this is not true. Ford stated it "theoretically" needed 2 years (until 9/1/84) lead time *if* it were free of all other constraints and it could concentrate its resources on developing passive belts. Ford also states that the above would

be true *only for its existing small car designs*. It does not apply toward new models being introducted. Ford then goes on to state that "it is not free of significant constraints on its resources" because of its need for new products to attain profitability, thus negating the possibility of a 9/1/84 date. Ford claims that date would cause it "incalculable harm." Ford also claims that abandoning its new car development program is not practicable. Lastly, Ford states that even attempting to meet a 9/1/85 date would involve disruption of product plans and could result in the elimination of a currently planned new vehicle entry. Ford also states that its convertibles and three front seat passenger cars could never meet the standard while retaining acceptable prices.

GM

The summary does not mention GM's concern over tooling capacities and outside engineering availability. GM stated that it *assumed* adequate tooling capabilities would be available. They expressed their concern over the demands on the tooling industry for simultaneous implementation (the same concerns earlier expressed by the American Seat Belt Council). They believe that this assumption, which is built in their 9/1/84 estimate of earliest compliance by assuming no delays outside their control, is "tenuous." Similarly, they require the services of up to 75 outside engineers to complete their programs by 9/1/84. Their availability was assumed, but "is unknown at this time." Any unavailability would "seriously jeopardize" the 9/1/84 effective date.

Fourth, the paper is insensitive to the economic consequences of firms' inabilities to comply by a specified date. As attested to in many manufacturer submissions, setting an earlier compliance date than possible would spell the destruction of those companies. Among the companies which are fearful of an unreasonable effective date are Chrysler, Ford, Alfa-Romeo, BMW, Jaguar, Rolls Royce, and Toyota. Similarly, there is not any discussion in the "paper" of corporate inability to pursue their product development plans while embarking on a crash

program to implement FMVSS 208 for currently designed cars. Such a cessation of activities would be necessary in many cases to even meet the earliest compliance dates claimed by the companies.

Additional comments follow:

The paper (p 20) claims that in 1981 "many manufacturers slowed their programs . . ." in anticipation of the government's rescission of the standard. Having read every item submitted to the docket on this subject and having reviewed company actions and plans during the extended course of these proceedings, I can find no mention or evidence of such a delay by anyone. The statement in the paper represents neither the public record nor the agency's belief in this matter, but rather appears to be the personal bias of the author.

On page 21, it is gratuitously stated that for cars (exclusive of those which already have automatic belts) that had been "certified" as meeting 208, the 9/1/83 date can be met. The paper then contradictorily states that "only a minority of car lines" would meet this criteria and that insufficient information was supplied by the manufacturers to estimate this amount. Again, this is the classic "strawman" argument wherein a fictitious hypothesis is postulated, then disproven. There was not *insufficient* information provided by the manufacturers, but *no* such information provided. The only claim that such cars exist is in the ESS paper.

The paper continues its bias by implying that 2 years lead time (9/1/84) for cars on which no work has been done is sufficient, contrary to manufacturer statements that 30-36 months is required and despite the earlier recognition that the authors had not been provided information from which to estimate the percentage production of when even earlier, design completed lines, could comply.

The paper is further incorrect in stating (p 22) that BMW did not comment on the possibility of airbags being installed within 3 years—they did. Also, it is not NHTSA's position that airbag

cars would of themselves enhance the public's acceptance of this automatic restraint standard. Although an airbag demonstration is actively being sought, it is for purposes of evaluating and supporting improved views on their real world performance and not for purposes of "selling" the standard insofar as belts are concerned.

Attachment

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENTS INSURERS, *et al.*,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent.

NHTSA'S RESPONSE TO STATE FARM'S AND NAII'S SUPPLEMENTAL MEMORANDA

INTRODUCTION AND SUMMARY

On October 20, 1982, State Farm filed with this Court a Supplemental Memorandum in Response to NHTSA's October 1 Submission, attaching, *inter alia*, a draft "Analysis of Manufacturers Comments on the Lead Time Required To Install Automatic Restraints in Cars (FMVSS 208)," prepared by NHTSA's Rulemaking Engineering Systems Staff [hereinafter Draft Rulemaking Report]. State Farm, along with NAII, argue that this draft report was inconsistent with NHTSA's October 1 filing—specifically, that the draft report supports a September 1, 1984 compliance date, and not NHTSA's statement to this Court "that practicable compliance with Modified

Standard 208 could not be achieved before September 1, 1985 at the earliest." (NHTSA's Oct. 1, 1982 Memo at 8).

As this memorandum makes clear, NHTSA's conclusion—that a September 1, 1983 compliance date for Modified Standard 208 is not achievable—is fully supported by the Draft Rulemaking Report. In addition, those parts of the Draft Rulemaking Report which State Farm characterizes as supporting a September 1984 compliance date are, on their face, the result of an erroneous compilation of the manufacturers' estimates, rather than an independent estimate of lead time by the draft's authors. Moreover, the Draft Rulemaking Report is inconsistent with another NHTSA staff report prepared by NHTSA's Plans and Programs Office at the same time. Finally, the Draft Rulemaking Report was in fact considered by NHTSA in preparing its October 1, 1982 submission to this Court, and is not inconsistent with that submission, although NHTSA determined not to file either staff report with this Court.

NHTSA's October 1 submission does not constitute a formal Agency rule for a new effective date. When NHTSA, through rulemaking, establishes a new effective date, the NHTSA Administrator will be free to consider or reject staff conclusions, and his judgment on a reasonable and practicable effective date will be entitled to deference. Judicial review of his conclusion should be based on the reasons he states in his final decision following rulemaking, which may be rejected only if those reasons are arbitrary and capricious.

DISCUSSION

1. On its face the Draft Rulemaking Report confirms that the manufacturers estimate only 1.9% of the total number of automobiles produced for sale in the United States could comply with the existing passive restraint standard by September 1, 1983 (Draft Rulemaking Report at 1)—a "date [which] is highly unrealistic for all cars to be sold in the U.S. * * *." (Draft Rulemaking Report at 23). NHTSA takes State Farm's

reliance on and support for the Draft Rulemaking Report as a concession that NHTSA was correct when it advised this Court that "a September 1, 1983 compliance date is *not* achievable, and that a significantly longer period than the thirteen months provided by this Court would be required for practicable compliance." (NHTSA Oct. 1 Memo at 2).[1]

2. The Draft Rulemaking Report was considered by the Agency in preparing its October 1 submission, and is *not* inconsistent with that submission, which advised this Court "that practicable compliance with Modified Standard 208 could not be achieved before September 1, 1985 at the earliest." (NHTSA's Oct. 1 Memo at 8). Thus, NHTSA's October 1 filing clearly reflects the conclusion of the Draft Rulemaking Report that a small number of vehicles could comply with Standard 208 in 1983, and other model lines (especially those which could be converted to automatic restraints most easily) could comply in 1984. (NHTSA's Oct. 1, 1982 Memo at 2-3, 8, n.*). However, even assuming the accuracy of the Draft Rulemaking Report's compilation that between 80-85 percent of all cars could comply with Modified Standard 208 by September 1, 1984 (see Draft Rulemaking Report at 1, 2, 3), the face of the draft report indicates that a September 1984 compliance date would prevent Chrysler, Mazda, Subaru, Volkswagen, Audi, Renault, Saab and Isuzu from selling all or most of their cars in the United States. (Draft Rulemaking Report at 3). While these manufacturers may produce only approximately 15-20 percent of the cars sold in the United States, NHTSA, in setting a *reasonable* and *practicable* compliance date, must take into account the problems of these manufacturers, and the competitive impact on the industry as a whole of imposing a standard that vastly favors a few major producers.

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[1] Both State Farm and NAII state that the Court should not resolve the lead time issue until after the Supreme Court disposes of the Petitions for Writs of Certiorari. State Farm Supplemental Memo at 5; NAII Supplemental Memo at 2.

In addition, the Draft Rulemaking Report notes that a September 1984 compliance date would result "in significant cost increases for the belt systems in some car lines * * *," and the installation of belts which "would not be those considered optimal by the manufacturers for both safety performance and consumer acceptance." (Draft Rulemaking Report at 24). The draft report notes that a September 1, 1985 compliance date would "result in higher quality restraint systems," "minimize[ ]" the cost of implementing the standard, "reduce the scheduling problems with sled and crash test facilities needed for developmental and compliance certification testing," and avoid forcing the manufacturers from "divert[ing] scarce skilled manpower from other projects to accelerated restraint development programs." (Draft Rulemaking Report at 24). Assuming NHTSA had set a September 1, 1985 compliance date through appropriate rulemaking proceedings, reliance on the foregoing would not be arbitrary and capricious—the appropriate standard for reviewing the Agency's actions.

3. To the extent that petitioners perceive certain inconsistencies between the Draft Rulemaking Report and NHTSA's October 1 filing this was because the Draft Rulemaking Report on its face contains certain inaccurate, unsupported or speculative statements. (*See, e.g.*, Felrice Memo attached as Exhibit D to State Farm's Supplemental Memo). In particular, the draft report's basis for concluding that 80-85 percent of the cars manufactured for the United States could be sold with a September 1, 1984 compliance date was not an independent expert estimate, but was attributed by the draft's authors to the statements of the manufacturers themselves.[2] However, an overwhelming majority of those

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[2] The Draft Rulemaking Report makes clear its sources for the September 1, 1984 compliance date:

> For the 7,799,510 cars that these manufacturers produce annually *they stated that:*
>
> * * * * *
>
> 2. By September 1, 1984, 6,649,214 or 85.3 percent of total productions could comply.

Draft Rulemaking Report at 1.

manufacturers whom the Draft Rulemaking Report predicts could meet a September 1, 1984 compliance date have made no such estimate. Indeed, the Draft Rulemaking Report mischaracterizes or ignores crucial parts of the submissions of General Motors,[3] Ford,[4] Chrysler,[5] Toyota,[6] and Honda, Nissan and

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[3] Although General Motors' submission refers to a 21 month lead time, the estimate was premised on no unforeseeable problems, no change in standard, and no problem with respect to outside tooling and ability to reassemble design teams. General Motors characterized its assumption that outside tooling would be sufficient as "tenuous," and said that the availability of design team members was "unknown." (G.M. letter at 2.)

[4] Ford estimated that compliance in its existing small car designs would require a minimum of 84 weeks—if Ford were "free of all other constraints and able to concentrate its resources exclusively on modifying existing passenger car designs to meet the principal passive restraint performance criteria of Standard 208 by means of passive belts with detachment features * * *." (Ross Affidavits, ¶ 6.) Ford's submission went on to explain, however, that Ford "is not free of significant constraints on its resources," (*id.*, ¶ 7), and that

> it would not be practicable, despite the theoretical minimum lead time estimates described in paragraph six, above, for Ford's existing small car designs, for Ford to meet an effective date for reinstituted passive restraint requirements that might be set to coincide with commencement of 1985 model year production.

Id., ¶ 8.

[5] Although Chrysler's submission states that it could comply with existing Standard 208 in its E body car line by September 1984 at the earliest, it also makes plain Chrysler's expectation that its inability to market its remaining vehicles would force the Company out of business if September 1984 were the compliance date. (Grice letter at 1.) Therefore, only in the most artificial way can Chrysler have been interpreted as stating that it "could comply" with respect to part of its production.

[6] Toyota Motor Corporation stated that "none of our vehicles with wheelbases of 100 inches or less could be equipped with automatic belts earlier than 1985 models, *and not even then for* some *car lines*"

Mitsubishi.[7] Of the manufacturers listed by the Draft Rulemaking Report as stating that they could comply in 1984, only Jaguar and Volvo actually made statements which may fairly be interpreted as the Draft Rulemaking Report represents them. In sum, the Draft Rulemaking Report's conclusion appears to be premised on ideal conditions for design, manufacturing, testing and assembly, and on the assumption that Modified Standard 208 would remain unchanged in every detail—a highly unlikely set of circumstances which was reflected both by the manufacturers' submissions themselves and by the Agency's September 1985 estimate.

In addition, the Draft Rulemaking Report conflicted with another report prepared by the Agency's Plans and Programs Office,[8] which analyzed the same information as the Draft Rulemaking Report, as well as other lead-time information available to NHTSA but not considered in the Draft Rulemaking Report. The Plans and Programs Report, attached hereto, concludes that "September 1, 1983 is not achievable, and that

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(Kawano letter at 4 (emphasis added))—a condition apparently ignored by the Draft Rulemaking Report's conclusion that *all* of Toyota's production could comply in September 1984.

[7] Honda Motor Co., Nissan Motor Co. and Mitsubishi Motors Corporation all furnished letters which described approximately a two year minimum lead time requirement for current models, and a 30 to 36 month minimum lead time for new models. The Draft Rulemaking Report placed all of Honda's production in the 1984 column—which is incorrect on the face of Honda's submission—and apportioned Nissan's and Mitsubishi's production in a ratio of approximately 4 to 1 in favor of the 1984 compliance date. While there may be an evidentiary basis for such an apportionment of Nissan's and Mitsubishi's production, it is not to be found in either of the manufacturers' submissions or the Draft Rulemaking Report.

[8] The Plans and Programs Office prepared the Regulatory Impact Analysis relied on so heavily by this Court in its June 1, 1982 opinion.

September 1, 1985, would be the earliest compliance date." (Plans and Programs Report at 1).[9]

4. This Court's August 4th Order directed NHTSA to advise the Court whether a September 1, 1983 "compliance date" for the passive restraint requirements of Modified Standard 208 "is achievable, or whether a longer period is required, setting forth adequate reasons therefor." The Court did not order NHTSA to set a new effective date or to submit staff level memoranda to be considered in formulating the Agency's response to the Court's inquiry. NHTSA's October 1 submission was filed "solely in response to the Court's inquiry, and without prejudice to the Agency's right * * * to modify either the substantive requirements or compliance dates of Standard 208 * * *." (NHTSA's Oct. 1, 1981, Memo at 1). Both NHTSA's October 1 memorandum and the attached affidavit were reviewed and approved by those NHTSA officials—including NHTSA's Associate Administrator for Rulemaking—who are ultimately responsible for setting an effective date, and who were aware of the Draft Rulemaking Report's shortcomings, the conclusion of the Plans and Programs Report, and the overall administrative record on lead time.

Contrary to petitioners' suggestion, NHTSA has not proposed a 1985 or any other compliance date. The Safety Act grants the authority to establish effective dates to the Secretary or his delegate acting pursuant to APA rulemaking proce-

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[9] Both reports were considered in preparing NHTSA's October 1 memorandum and affidavit. NHTSA attorneys received the Plans and Programs Report in draft form on or about September 20, 1982, and drafts of the Rulemaking Report in the period September 22-24, 1982. The Draft Rulemaking Report was put in draft final form and forwarded to NHTSA's Chief Counsel's Office on the afternoon of October 1, 1982, just as the Department of Justice was preparing to file the October 1 submission. There were no significant differences between this draft and the September 22-24 draft.

dures. 15 U.S.C. § 1392. Here there has been no such proceeding, and it would be contrary to the statutory assignment of this rulemaking authority for this Court to consider and establish a new effective date. It would be all the more inappropriate for this Court to base a compliance date on one of two agency staff reports, on which, because of its errors, the Agency has chosen not to rely.

Even if the Agency had conducted a rulemaking proceeding, its internal staff papers would not have been mandatory subjects for public disclosure, nor their contents a basis for reversing the agency. *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 591 n.22 (1981); *see also Ethyl Corp.* v. *EPA*, 541 F.2d 1, 52-53 (D.C. Cir. (en banc), *cert. denied*, 426 U.S. 941 (1976). The Agency is free to make its own judgment about the strengths and weaknesses of the evidence before it, and is "not rigidly barred from taking a contrary position" to that adopted by one of its staff offices. *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 288, n.4 (1974). The decision about which of two competing studies the Agency relies upon is one for the Agency and not for the court (*Lead Industries Association* v. *EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980)), and the role of the court in such cases would be limited to reviewing the Administrator's final decision to see whether the stated reasons for his decision were arbitrary

and capricious. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971).

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

/s/ Robert E. Kopp
ROBERT E. KOPP (202) 633-3311
Director, Appellate Staff

/s/ Michael F. Hertz
MICHAEL F. HERTZ (202) 633-3180
Appellate Litigation Counsel
Civil Division
Department of Justice
Washington, D.C. 20530

OF COUNSEL:

FRANK BERNDT
Chief Counsel

STEPHEN P. WOOD
Assistant Chief Counsel

DAVID W. ALLEN
Assistant Chief Counsel

HUGH F. OATES
EILEEN T. LEAHY
SHIRLEY RANSOM
Attorneys
National Highway Traffic
Safety Administration
Department of Transportation
Washington, D.C. 20590

LEADTIME CONSIDERATIONS FOR PASSIVE RESTRAINTS

SUMMARY

On August 4, 1982, the US Court of Appeals for the District of Columbia Circuit ordered that the compliance dates of FMVSS 208 be stayed until September 1, 1983, (Model Year 1984), and that the court be advised, by October 1, 1982, whether such a compliance date was achievable, or if a longer period was required. If a later date was required, the court required "adequate reasons therefor." This analysis shows that September 1, 1983, is not achievable, and that September 1, 1985, would be the earliest compliance date.

BACKGROUND

Passive restraints have been an active issue for at least a dozen years. The earlier history is not of importance here, but the actions since October 1981 are. On October 23, 1981, NHTSA rescinded the requirement that passive restraints be installed in passenger automobiles. Prior to the rescission, the requirement was that vehicles greater than 100-inch wheelbase have passive restraints by September 1982 and that vehicles with smaller wheelbases have them by September 1983.

Following the rescission, a suit was filed to reverse the Agency's decision. As indicated in the Summary, the Court ordered reinstatement of the standard. The Court recognized that the compliance date would need confirmation by the Agency by October 1, 1982. (See Attachment A for the August 4, 1982, Court order).

In order to comply with the court order, the Agency analyzed information in the briefs prepared by MVMA in response to the suits, and in addition, requested current information from the manufacturers which was also analyzed. This evaluation presents the results of the Agency's analysis to determine the earliest date passive restraints could be mandated for passenger automobiles sold in the United States.

FUNDAMENTAL CONSIDERATIONS

When NHTSA rescinded the passive restraint requirements, the manufacturers had ten months before production was ready to start on the larger wheelbase models (from November 1981 to August 1982) and twenty-two months before the smaller wheelbase models had to be ready for production in August 1983. In order for the manufacturers to start production now, they would require the above time increments assuming they could literally start exactly where they stopped. This is not a reasonable expectation. The manufacturers need to reassemble their design teams, and to spend some time starting up the design process, including reevaluating the designs they had in light of current conditions and re-opening negotiations with

suppliers. If only one month were allowed for reassembling the teams and other start up efforts, there would be eleven to twenty three months before they could be expected to begin production.* A further consideration is that it is very difficult for the manufacturers to introduce a change of this type except at the start of a model year. (This issue is further discussed in the *Other Issues* section.) Thus, based only on this simple logic it would seem reasonable that the manufacturers could barely meet the requirements for their large and intermediate cars in the model year following eleven months from August 1982, or MY 1984, and for their small cars in the model year following twenty-three months from August 1982, or MY 1985.

In order to fully evaluate the basis of this reasoning, an analysis was made of the information presented in affidavits appended to the Brief for Intervenors filed by MVMA on February 1, 1982, and in the manufacturers submissions pursuant to the Agency's request. These two analyses follow. They essentially show that some models could be introduced as MY 1985 vehicles, and with a few exceptions the remaining models could be introduced as MY 1986 vehicles. The primary reason for the discrepancy between the fundamental considerations and the analysis based on the manufacturers submission is that passive restraints for new models will require a complete development cycle, that is, the manufacturers are not picking up where they left off, but rather are starting anew.

THE BRIEFS

The Brief for Intervenors filed by MVMA in February 1, 1982 included information on leadtime from American Motors, Chrysler, Ford, General Motors, and the Automobile Impor-

*Manufacturers submissions show periods from five weeks to six months required for start-up activities.

ters of America. The leadtimes shown in the Brief are summarized below:

- AMC—36 months, to coincide with the start of a model year.
- Chrysler—MY '84 for existing E body; MY '85 for other existing vehicles if final order by June 6, 1982; MY '85 for new H body if final order by March 7, 1982. Mid-model year introduction would create severe financial harm to the company.
- Ford—60 weeks for the Panther line, 67 weeks for the Fox line. No estimate provided for the Erica line.
- GM—21 months for existing vehicle lines. No estimate for new vehicles.
- AIA—12 to 48 months depending on the manufacturers, and the details of the car lines involved.

Assuming an August 1982 start date (the date of the Court Order), the times shown above indicate that Ford and GM would be able to meet a MY 1985 production start date for their existing car lines, AMC a MY 1986 production startup date, Chrysler between MY '85 and MY '87 production startup dates, and the importers varying from MY '84 to MY '87. (See Figure 1). A detailed description of these submissions follows:

AMC Affidavit

AMC provided a two page brief, signed by their Director of Vehicle Safety Programs. The brief stated that 36 months would be required assuming normal product development processes and introduction at the start of the model year. There was no detailed support for the time estimate.

Chrysler Affidavit

Chrysler provided a comprehensive brief signed by their Vice President for Engineering. In this affidavit, Chrysler stated that at the time of the rescission, the development effort on their 1983 model requirements were about half done, and the program of the 1984 models has just begun. They assert that

redesign of front doors, roof structure, instrument panel, interior trim, front seats and the seat belt assembly itself would be required. They also make the point that Chrysler has never built vehicles equipped with passive restraints and could reasonably be expected to encounter some development problems. In support of these claims, Chrysler submitted a detailed list of the parts requiring redesign, a nine page network chart of the required design effort, and a five page computer printout showing an original schedule for the L-24 model. This effort had been scheduled to start in June 1981 and end in August 1983.

An analysis of the Chrysler submission indicates that the times are reasonable.

Ford Affidavits

Ford submitted two affidavits. The first was signed by the Manager of program timing and control, and the second was signed by the Executive Engineer for Trim, Seating, and Restraint Engineering.

In the first Ford affidavit, a general development schedule is included, and the specific times for the development of passive belts for the Panther (Ford, Mercury, Lincoln, and Mark) and the Fox (Fairmont, Zephyr, LTD, Marquis, Mustang, Capri, Thunderbird, XR-7 and Continental) car lines are discussed. They state that a formal "Stop Work" order was issued on October 29, 1982, four work days following NHTSA's announcement of the rescission. The various steps required to develop the passive restraints are discussed along with time estimates for their completion. Included is mention of a development problem encountered after initial release of the passive restraints intended for the Panther. A summary schedule is presented showing 60 additional weeks required for the Panther designs, and 67 weeks for the Fox designs.

The second Ford petition makes the point that the problem is not one of developing a single system for the Panther vehicles and another for the Fox vehicles. The particular belt system

used in each model of each carline would differ in design details from the systems used in other models. These differences would be necessitated by "packaging" differences, for example, the differences in interior and exterior structure between a two-door sedan and a four-door sedan or station wagon, and styling theme differences, for example, the design differences necessitated by the differences in appearance and appointments of a Ford and a Lincoln. The affidavit presents essentially the same schedule as the first Ford affidavit.

The Agency has analyzed the Ford submissions and believes that the times are consistent with common practice in the industry.

GM Affidavit

The GM affidavit was signed by the Project Manager of the Automatic Belt Project Center. The affidavit makes the point that "converting" to automatic belts is a different problem than converting from the planned automatic belts to the manual belts when the NHTSA order was issued allowing a one year delay. The affadavit also indicates that 36 different seat belt system configurations are required for the nine vehicle car lines which would have required passive restraints in MY '83. The extent to which the vehicle designs would need to be modified in order to accomodate pasive restraints was also described, with the following portions of the vehicle requiring re-design:

- Front Door Assembly
- Vehicle Interior Trim
- Underbody Assembly
- Front Seat Frames
- Vehicle Carpeting
- Roof Rail Assembly
- Center Console
- Center Pillar Assembly

- Wiring Harness
- Instrument Panels

The degree to which these components would have to be modified is not described—it is believed some of them would be rather minor changes (such as vehicle carpeting), but others would likely be significant efforts (door assemblies, center console).

In order to accomplish the changes required for the installation of passive restraints, GM states that it could be done practically only at model changeover time, otherwise it would require a three week shutdown for all of their 23 assembly plants.

The GM submission presents data which is consistent with other industry estimates. Their leadtime requirement is somewhat shorter than for Chrysler and AMC.

AIA Affidavit

The Automobile Importers of America submitted a letter indicating 12 to 48 month leadtime required for their members. They offer no support for this estimate.

RESPONSES TO THE AGENCY'S REQUEST FOR LEADTIME DATA

In order to have updated information, NHTSA sent a letter to MVMA and the AIA requesting an update of the information provided in the Brief. A copy of the letter is included here in Attachment B. The responses to the letter, received by September 17, 1982, are shown in Table 1 and in Figure 2, assuming an August 1982 start time. The chart shows that some manufacturers could meet the MY '85 startup time for some of their models, and with a few exceptions, all could meet a MY '86 startup time.

American Seat Belt Council

ASBC represents the webbing and belt manufacturers. They indicated that the final designs had to be submitted by the

manufacturers at least 9 months in advance of any belt or webbing production. They also indicated it would be difficult to meet a September 1, 1983 deadline. ASBC's one page response was not detailed.

TABLE 1
Respondents to NHTSA's August 9, 1982 Request

Manufacturer	Passive Restraint Leadtime Estimate (in months)	Start Date August 4, 1982				
		MY 1983 Sept '82	MY 1984 Sept '83	MY 1985 Sept '84	MY 1986 Sept '85	MY 1987 Sept '86
GM	21 (current models)			X		
Chrysler	36 (all models)				X	
Ford					X	
AM	24-36 (24 if few changes)				X	
VWoA						
—Domestic	0	X				
—Imports	24-36 (January 1986 for Audi 5000 and Rabbit Convertible)				X	
Nissan (Datsun)	23 (current models) 30 (new models)			X		
Renault	30				X	
Jaguar	15		X			
Volvo	24 (PI for MY 1986)			X		
Rolls-Royce	31				X	
BMW	22 (details confidential)			X		
Mazda	31				X	
Mitsubishi	24 (current models)				X	
Isuzu	36 (all models)					X
Saab	42 (details confidential)					X
Memo: Total number of firms		1	1	4	8	2

* * * *

General Motors

GM stated that their minimum required leadtime to begin installation of detachable passive belt systems was 21 months. The corporation noted that the leadtime for detachable belts could be shortened to 21 months only because of the R&D design work that had been performed for the original September 1, 1982 target date. GM, also, indicated that the 21 month leadtime estimate was predicted on the assumption of available supplier capacity and the assumption that detachable belts would be allowed. It would be impossible to implement FMVSS 208 as a running change; passive belt installation must start with the beginning of a new model year. The engineering staff assembled to design passive belts would have to be re-assembled. GM's response was in the form of an affidavit; Gant charts were provided and other leadtime issues were discussed in some detail.

Chrysler Corporation

Chrysler indicated it could not meet the September 1, 1983 deadline for any carlines, but could meet a September 1, 1984 deadline for their new E-car (bigger than current K-car), if detachable belts are allowed. Any date earlier than September 1, 1985 (MY 1986) would cause severe production disruptions. Chrysler had to re-assemble engineering staff and has not performed any FMVSS 208 work on its 3 new post—1985 carlines. Chrysler's response was in the form of an affidavit. Scheduling charts were provided, as well as a detailed discussion of the leadtime problems.

American Motors

AM indicated that it required leadtime of 24-36 months to comply with the current 208. The company's two-page response reiterated the position taken in the affidavit submitted in January 1982.

Volkswagen of America (Incl. VW's imports)

Currently, automatic restraints are an option on the domestically produced Rabbit model. The German built Quantum, Audi 4000, Quatro, and Sirocco models could meet a July 1, 1986 deadline. January 1986 is the earliest date for the Audi 5000 and the Rabbit Convertible. VWoA's response (in the form of an affidavit) provided Gant charts indicating the events required to lead to production.

Nissan (Datsun)

Nissan stated that it could not meet the September 1, 1983 deadline. Because most of Nissan's models have less than a 100" WB, Nissan was preparing to meet the Sept 1, 1983 date, but was only in the development stage when FMVSS 208 was rescinded. Nissan indicated it would require at least 23 months to comply with FMVSS 208 on current models; for newer models it would require another 7 months of work. Nissan's two page response did not provide any further details.

Renault

Renault questioned the wisdom of beginning work on the installation of passive restraints, in view of the uncertainties created by pending litigation. Nevertheless, the company estimates that it would require 30 months leadtime. The company's one-page submission provided no further details.

Jaguar Cars LTD.

Jaguar indicated that it cannot meet the Sept 1, 1983 deadline. The earliest deadline they could meet would be January 1984. Jaguar's response included Gant charts and production event schedules indicating the amount of work required.

Volvo

Volvo indicated it was not possible to comply with the September 1, 1983 deadline. Volvo stopped all work on FMVSS 208, when 208 was rescinded. A minimum of 24 months of leadtime

would be required to comply. Volvo would prefer, however, a MY 1986 target date. Volvo's response included a time phased leadtime chart detailing the steps required to install passive restraints.

Rolls-Royce

Rolls-Royce indicated that an effective installation date must necessarily be 31 months from the date of the decision. Rolls-Royce's response detailed the production and releasing steps required to install passive restraints.

BMW of North America

BMW stipulated that its submission was confidential. In prior statements, cited in this response, BMW indicated that it would require a 22 month leadtime to comply with FMVSS 208, beginning with the first full model year. BMW's confidential response was very detailed with Gant charts and design discussions.

Mazda

Mazda indicated that, in order to comply with FMVSS 208, its designs must be modified and supplier contracts must be renegotiated. This would require a minimum of 31 months, commencing installation at the beginning of a new model year. Mazda's response provided a brief description of the steps required to install passive restraints.

Mitsubishi Motors Corporation

MMC stated it cannot meet the September 1, 1983 deadline. It would require a minimum of 24 months leadtime for its current models, and 36 months for all models to be produced after September, 1983. Mitsubishi's response provided a brief description of the steps required to install passive restraints.

Isuzu

Isuzu submitted a three-page letter indicating they would require 3 years to introduce passive restraints for one model,

and a total of 3½ years because they intend to have more than one model. A brief schedule table was included.

Saab

The Saab response indicated they would be able to meet a September 1, 1986 (MY '87) date for passive belts, and a September 1, 1988 date (MY '89) if air bags were required. Their one-page letter included a two-page confidential attachment which showed a moderately defined schedule. Their submission does not support their MY '87 proposed start-up date.

Ford

Ford responded to the request for current information in an affidavit signed by the Executive Vice President for the Car Product Development Group for North American Automotive Operations. The response incorporates by reference the two earlier affidavits to the court.

Ford's main point was that although a minimum of 84 weeks (roughly 20 months) would be required to develop passive belt systems for its existing small cars, (which would have to precede by four to six weeks the mandatory compliance date), it does not have the manpower resources to do that and at the same time continue development of the replacements for these vehicles. Ford considers the replacement of these vehicles necessary to "help it recover profitable levels of sales, the lack of which accounted directly for Ford Motor Company's having lost in excess of $3,566,000,000 in North America during the period 1980 and 1981." The affidavit goes on to say that without such model changeover they could suffer "incalculable harm."

Ford voices a further concern, that the schedule estimates above are predicated on the use of passive belts. They note that as a result of the court order and possible further rulemaking, other types of passive restraints may be required. This would require the design process to begin anew. No estimates are offered for this eventuality. They also note that the impending

"comfort and convenience" rule could "importantly influence" the design of Ford's passive restraints.

Another issue raised by Ford is that three passenger front seats and convertibles could not be brought into conformity with FMVSS 208 without airbags, which they believe will be too costly for the "general car buying public." They estimate a two-occupant air bag system would cost Ford in excess of $1,450 at 50,000 vehicle sales per year in 1985 economics.

The conclusion of the Ford affidavit is that they could meet a September 1, 1985 compliance date by some rearranging of their new car programs, possibly including the dropping of one planned new vehicle.

The transmittal letter, signed by the Director of the Automotive Safety Office, states that it will cost Ford between $200 and $280 million to achieve compliance.

BRIEFS VS. SUBMISSIONS TO NHTSA

A comparison was made between submissions to the brief and in response to the agency's August 9 request, for those companies which responded to both. The comparison, shown in Table 2, indicates that the responses are consistent.

TABLE 2
A COMPARISON OF SUBMISSIONS TO THE COURT AND NHTSA
(Dates Measured From August 4, 1982)

Respondent	January 5, 1982 Brief submission	August 9, 1982 Submission to NHTSA	Variance
Chrysler Corporation	September 1, 1985 —26 months for current models —29+ months for new models	September 1, 1985 —24 months for new E-car —September 1985 for new models	Basically None
American Motors	September 1, 1985 —36 months	September 1, 1985 —36 months —34 months if very few changes	Basically none, except if the number of design changes are minor
General Motors	September 1, 1985 —21 months for larger cars (WB>100") —Not applicable to future models	September 1, 1984 —21 months	Basically none; letter response indicates 21 months for all models

Respondent	January 5, 1982 Brief submission	August 9, 1982 Submission to NHTSA	Variance
Ford Motor	September 1, 1984 —60 weeks for Panther models (WB>114") —67 weeks for Fox models (100"<WB<114") —No discussion of Erika models	September 1, 1985 Applicable to small cars	Earlier responses not applicable to small cars. Ford identifies manpower limitation if both carry-over and new models are to be redesigned simultaneously
Automobile Importers Of America	September 1, 1983-September 1, 1986 —12 to 48 months, dependent on which foreign manufacturer questioned	No response from AIA, but from foreign manufacturers —VWoA imports (24-36 months) —Nissan (23 months current models) —Renault (30 months) —Volvo (24 months) —BMW (22 months) —Mazda (31 months) —Mitsubishi (36 months)	N.A.

OTHER ISSUES

Timing

To require the changeover for the introduction of passive restraints at any time other than the start of the model production year (July-September) would increase the manufacturers' costs. The installation of passive restraints at final assembly is not a minor "running change."

GM, in its January 1982 affidavit, estimated that a mid-model year effective date would require the corporation to shut-down its 23 assembly plants for 3 weeks each. Ford's affidavit also noted that a mid-model, running change would be expensive and disruptive. Chrysler's affidavit labelled a mid-model year introduction "not practicable."

In essence, a mid-model year effective date would require a second launch during the term of a model year already in progress.

In the case of detachable belt systems, modified right and left B-pillars, front roof structure, instrument panels, belt assemblies, etc. would be required. A change of this magnitude would necessitate assembly plant shut down. It is the Agency's experience that production modifications of the magnitude of passive belt systems or air cushions are most appropriately confined to the beginning of the model year.

Costs

GM, Ford, and Chrysler provided estimates of the costs of equipping cars with passive restraint systems (detachable belts) GM estimated the total cost of tooling and testing for the installation of passive belts, on its broad product line, to be $375 million over 21 months. Ford estimated a range of costs of between $200 and $280 million depending upon the required compliance schedule. The equivalent Chrysler estimate was $100 million between today and 1986. Currently, these expenditures are substantial for the severely depressed domestic industry. For Chrysler, in particular, $100 million is not a

non-trivial financial outlay. After accounting for inflation, GM's estimate of $375 million is consistent with earlier cost estimates for automatic restraints provided by GM. Previously, Chrysler had not provided a total cost estimate to NHTSA. The Chrysler submission provided the scheduled budget flow required to install passive restraints between today and 1986, as follows:

	Average Monthly Expenditures
1982	$ 500,000
1983	$1,500,000
1984	$2,800,000
1985	$2,600,000
1986	$1,800,000

Phased-Out body Platforms

The domestic manufacturers have not completed the schedule downsizing of all their product offerings. If passive restraints were required by September 1, 1983 (MY 1984), numerous larger car bodies that are soon to be replaced by new, downsized counterparts would be affected. That is, vehicle modifications would be required on cars to be dropped in as little as six months. This means the cost of tooling for these models would have to be amortized over one year or less, rather than the normal four or five year period.

By MY 1986, most of this downsizing and body replacement will have been completed. For example, Ford submission stated that every Ford passenger car line would be renewed before the MY 1987 begins. For the domestics, the body platforms to be dropped and replaced (from publicly available information) are as follows:

Manufacturer	Body Platform	Carline Example
GM	Mid '84 E (EJ)	Rivieria
	Mid '84 K (KJ)	Seville
	MY 1985 GS (N)	Cutlass Supreme
	MY 1986 B (BX)	Olds 88
	Mid '84? C (CX)	Electra 225
Ford	Mid '84? Panther	Mark VI
	MY 1986 Panther	Grand Marquis
Chrysler	Mid '85? M-NY	New Yorker
	Mid '85? M	Diplomat

CONCLUSION

An evaluation of the manufacturers submissions to the Court and to the agency confirms the finding that some vehicles could be equipped with passive restraint in MY 1985; but the bulk of the fleet would require an effective date beginning with MY 1986. Based on this analysis, MY 1986 appears to be the earliest date which could be mandated for the manufacturers in initiate production of passive restraints.

* * * *

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Nos. 82-354, 82-355, 82-598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, *et al.*,
Petitioners,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

RONALD A. ZUMBRUN
PACIFIC LEGAL FOUNDATION
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN, *Counsel of Record*
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners
Consumer Alert and Pacific Legal Foundation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals illegally restricted the authority of the National Highway Traffic Safety Administration to rescind its passive restraint mandate when it ruled that that safety standard had almost, but not quite, been approved by Congress.

2. Whether the court went beyond the proper scope of judicial review in overturning the agency's decision to rescind a far-reaching regulation which it could no longer determine to be effective.

PARTIES BELOW

There were two consolidated cases in the Court of Appeals. The parties below were as follows:

1. *Civil Action No. 81-2220*

a. *petitioners*—State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, and Leorlin Boyd;

b. *respondents*—Department of Transportation, Drew Lewis, as Secretary, National Highway Traffic Safety Administration, and Raymond A. Peck, Jr., as Administrator;

2. *Civil Action No. 81-2221*

a. *petitioners*—National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung;

b. *respondent*—National Highway Traffic Safety Administration;

3. *Intervenors in Both Cases*

a. *in support of the insurance companies, et al.*—Albert B. Lewis, New York State Superintendent of Insurance;

b. *in support of the agency*—Automobile Importers of America, Inc., Consumer Alert * and Pacific Legal Foundation,** Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corp., Checker Motors Corp., Chrysler Corp., Ford Motor Co., General Motors Corp., and Volkswagen of America, Inc.

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* Consumer Alert is a nonprofit organization incorporated in the District of Columbia, with headquarters in California. Consumer Alert has no parent companies, affiliates, or subsidiaries.

** Pacific Legal Foundation is a nonprofit organization incorporated in California. Pacific Legal Foundation has no parent companies or subsidiaries, but it is affiliated with the College of Public Interest Law, a fellowship program for law school graduates.

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IN THE

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OCTOBER TERM, 1982

Nos. 82-354, 82-355, 82-398

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

OPINIONS BELOW

The opinion of the Court of Appeals overturning the decision of the National Highway Traffic Safety Administration (NHTSA) is officially reported as *State Farm Mutual Automobile Insurance Co. v. Department of Transportation*, 680 F.2d 206 (D.C. Cir. 1982). The opinion is reprinted in the appendix to the petition for certiorari of the Motor Vehicle Manufacturers Association, *et al.* (MVMA App.) at 1a. The judgment of the Court of Appeals is reprinted in the MVMA Appendix at 160a. The order and supporting memorandum of the Court, establishing September 1, 1983, as the compliance date for the passive restraint mandate, have not

been officially reported but are set forth in the MVMA Appendix at 79a. NHTSA's decision to rescind its prior rule on passive restraints is published at 46 Fed. Reg. 53,419 (1981), and is reprinted in the MVMA Appendix at 88a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 15 U.S.C. § 1394(a)(4).

The decision of the Court of Appeals was issued on June 1, 1982, and its order setting a compliance date was issued on August 4, 1982. On August 4, the court also denied motions for an extension of time in which to seek rehearing. MVMA App. at 83a. No rehearing was requested in this case.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the validity of NHTSA's decision to rescind its passive restraint mandate. Under that mandate, automatic front-seat occupant restraints would be required in all new cars, beginning with large and mid-size cars manufactured on or after September 1, 1982. The passive restraint mandate, as well as the decision to rescind it, was issued under the National Traffic and Motor Vehicle Safety Act of 1976 (the Safety Act), as amended, 15 U.S.C. §§ 1381, *et seq.*, MVMA App. at 163a. The regulation itself, Federal Motor Vehicle Safety Standard No. 208, is contained in 49 C.F.R. § 571.208 (1981); the amended provisions appear at 46 Fed. Reg. 53,427 col. 2, MVMA App. at 120a.

NHTSA's decision was reviewed by the Court of Appeals pursuant to 5 U.S.C. § 706 of the Administrative Procedure Act (APA) (MVMA App. at 162), which is applicable to this proceeding under 15 U.S.C. § 1394(a)(3) and § 1410b(c)(2).

STATEMENT OF THE CASE

Consumer Alert and Pacific Legal Foundation hereby adopt the statement of the case contained in the brief of the Department of Transportation (DOT).

SUMMARY OF ARGUMENT

In overturning NHTSA's rescission of the passive restraint mandate, the Court of Appeals relied on the premise that this mandate had almost, but not quite, been endorsed by Congress. This view, however, was based solely on *post hoc* unenacted congressional reaction. Such informal legislative expressions do not amend or repeal the statutory authorization under which NHTSA operates. Under the Safety Act, the agency has broad powers to issue, amend, and rescind automotive safety standards. Nothing in the language or legislative history of that act suggests any congressional intent to restrict NHTSA's power in regard to passive restraints.

The congressional reaction relied upon by the court does not alter this construction of the Safety Act. The court's reading of this congressional reaction is contradicted by enacted legislation on the issue.

On the basis of this almost-but-not-quite congressional approval, the court proceeded to apply an unjustifiably intrusive standard of review to NHTSA's action. The court placed the burden of proof on the agency, and reweighed the evidence in areas where the agency's judgment was entitled to special deference. The agency's forecast of public reaction, its assessment of equitable issues, and its interpretation of the ignition interlock episode were all brushed aside despite their support in the record.

Because the Court of Appeals applied an unfounded and unprecedented standard of review, its decision should be reversed. Because the court declared that its judgment would be the same under any standard of review, this Court should uphold NHTSA's decision on the merits.

ARGUMENT

INTRODUCTION

The length and temperature of the debate over the passive restraint mandate tend to obscure a basic fact—it is the American public which will be the ultimate beneficiary of the mandate, or its ultimate victim. For this reason, it is important to remember just what position the public has taken on this issue, and what choices the public would have with or without a regulatory mandate of these devices.

A large segment, if not majority, of the American people opposes any federal imposition of passive restraints. Of the thousands of letters received by NHTSA in its 1976 proceeding on this issue, those opposing a mandate outnumbered those in favor by more than three-to-two. DOT, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection* 55 n.57 (1976), Court of Appeals Joint Appendix (C.A.J.A.) at 2,122.[1] In the 1981 proceeding, approximately half of the comments received from private citizens were in opposition to a mandate. 46 Fed. Reg. 53,429 col. 3, MVMA App. at 129a.

When air bag-equipped cars were offered for sale in the mid-1970's, they were rejected by the marketplace. NHTSA, *Final Regulatory Impact Analysis* IX-20 (1981), C.A.J.A. at 235. Cars equipped with passive belts have been sold since 1975, and they continue to be available for those who desire to purchase them. *See* 680 F.2d at 215 n.12, MVMA App. at 18a-19a.

This last situation illustrates the alternatives which the public would face depending upon how this issue is

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[1] Copies of the extensive joint appendix which was before the Court of Appeals have been lodged with this Court. In order to distinguish this from the far shorter joint appendix which was prepared for this Court, the former document will be referred to as C.A.J.A. in this brief.

resolved. In the absence of a passive restraint mandate, those who favored it can still purchase cars equipped with passive belts, or they can use conventional seat belts which are equally effective. Under a mandate, that large proportion of the public opposed to it would have no choice but to pay for it and live with it, just as the public had to pay for and endure NHTSA's past imposition of ignition interlocks.[2]

NHTSA has decided not to impose passive restraints. As is shown below, that decision was legally valid in all respects.

I

THE COURT OF APPEALS BASED ITS STANDARD OF REVIEW ON AN ASSERTED ALMOST-BUT-NOT-QUITE CONGRESSIONAL APPROVAL OF THE PASSIVE RESTRAINT MANDATE; THIS STANDARD IS AS UNFOUNDED AS IT IS UNPRECEDENTED

The standard of review applied by the Court of Appeals is the key issue in this case. The court devoted one-third of its lengthy opinion to formulating the standard which it used. *See* Section II of the opinion below, 680 F.2d at 218-30, MVMA App. at 24a-49a. Despite the fact that NHTSA's enabling legislation is totally silent on the question of whether passive restraints should be mandated, the court based its review on a supposed almost-but-not-quite congressional approval of such a mandate. Despite the fact that agency action is entitled to a presumption of validity, the court decided that it was not the insurance companies but "NHTSA [which] has the burden of . . . show-

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[2] These devices prevent the starting of a car unless its front-seat occupants have buckled their seat belts. NHTSA required their installation in new cars between 1973 and 1975. *See Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1341 & n.14 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). Most of the devices were soon deactivated by a "furious" public, and Congress quickly banned their requirement. 680 F.2d at 222, MVMA App. at 33a; *see* 15 U.S.C. § 1410b(b)(1).

ing that rescission of Modified Standard 208 was reasonable." 680 F.2d at 229, MVMA App. at 47a. These rulings, which lie at the heart of the court's decision, are without any legal basis whatsoever.

A. NHTSA's Action Is Subject to the Traditional Standard of Review for Informal Rule Making, Coupled With the Requirement that the Agency Adequately Explain Its Reversal of a Prior Decision

As the Court of Appeals recognized, NHTSA's decision to rescind Standard 208 is the result of informal rule making conducted under 5 U.S.C. § 553 of the APA, which applies to this safety standard pursuant to 15 U.S.C. § 1392(b) and § 1410b(c)(2). *See* 680 F.2d at 218, MVMA App. at 24a-25a. Prior court decisions on Standard 208 are in agreement on this point. *See Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343, *cert. denied*, 444 U.S. 830 (1979); *Chrysler Corp. v. DOT*, 472 F.2d 659, 667-68 (6th Cir. 1972). In the Court of Appeals' own words, the applicable standard of review is the "well established [and] familiar 'arbitrary and capricious' test." 680 F.2d at 218, MVMA App. at 25a.

Familiar as this test is, its elements bear repeating. There is a presumption that the agency's action is valid, but this does not shield it from "a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The agency must have engaged in a "consideration of the relevant factors" (*id.* at 416) and there must be "a rational basis for its treatment of the evidence," but the standard "does not require more." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). While the court's

> "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416.

The fact that NHTSA's action reversed a prior decision adds an additional element—the requirement that this reversal be adequately explained. As the court stated in *Pacific Legal Foundation*, which involved an *earlier* policy reversal on Standard 208,

> "because the order under review here reversed a prior policy, the agency must provide 'an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.' [Footnote omitted.]" 593 F.2d at 1343-44, *quoting from Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

While such a change may cause the court's review to be "heightened somewhat" (*NAACP v. FCC*, 682 F.2d 993, 998 (D.C. Cir. 1982)), it does not alter the "highly deferential" nature of that review. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). Even when rules are repealed, "a court should defer to the administrative judge as to whether conditions have in fact changed and what action, if any, is now warranted." *NAACP*, 682 F.2d at 998. "The test is *still* whether the agency's decision is rational and based on the record." *Id.* (emphasis added).

As is shown below, the test which the Court of Appeals applied to NHTSA's decision was nothing of the sort.

B. The Court of Appeals Had No Justification for Reversing the Burden of Proof and Placing It on NHTSA

When administrative actions are challenged, the burden of proof lies on the challenger, not the agency:

> "Administrative actions are presumed to be valid. The burden is on the party challenging them to overcome that presumption." *Mazaleski v. Treusdell*, 562 F.2d 701, 717 n.38 (D.C. Cir. 1977).

The Court of Appeals, however, held that it was not the insurance companies but "*NHTSA* [which] has the burden . . . of showing that rescission of Modified Standard 208 was reasonable." 680 F.2d at 229, MVMA App. at 47a (footnote omitted; emphasis added). It based this reversal of the burden of proof on its finding that there was a "course that Congress has set" on the issue of passive restraints. 680 F.2d at 242, MVMA App. at 74a. Despite the fact that there is not one single piece of enacted legislation which endorses the passive restraint mandate, the court ruled that this regulation had been "essentially confirmed" by Congress. 680 F.2d at 229, MVMA App. at 47a. Given this congressional "confirmation," the court replaced the "well established" and "familiar" deferential standard of review with something entirely different. According to the court,

> "[j]udicial scrutiny of agency action . . . depends on the extent to which the agency has deviated from congressional expectations. An agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress." 680 F.2d at 229, MVMA App. at 48a.

It will be shown that the path which the court referred to was not marked by Congress; it was created by the court itself. Contrary to the court's assertions, neither the Safety Act, nor the 1974 amendments to that act, nor any congressional action since then restricts NHTSA's discretion to rescind Standard 208. To the extent that Congress *has* spoken on this issue, it has disaffirmed rather than endorsed the imposition of these devices on the American public.

1. *NHTSA's Statutory Power To Rescind Standard 208 Is Not Restricted by an Alleged Almost-But-Not-Quite Congressional Approval of the Passive Restraint Mandate*

The Safety Act states that the Secretary of Transportation "may by order amend *or revoke any* Federal motor

vehicle safety standard established under this section." 15 U.S.C. § 1392(e) (emphasis added). This authority has been delegated to the Administrator of NHTSA under 49 C.F.R. § 501.2(a) (1981). If there is a statutory limitation on NHTSA's power to rescind the passive restraint mandate, it must be contained in either this or another statute.

The Court of Appeals did not identify any statutory provision which limits NHTSA's power in regard to Standard 208. Instead, it claimed that

> "the legislative history of the 1974 Amendments to the Safety Act and the subsequent congressional reaction to Modified Standard 208 suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." 680 F.2d at 222, MVMA App. at 32a.

It was on this basis that the court reversed the burden of proof, creating an entirely new scope of review "lest the congressional will be ignored." 680 F.2d at 228, MVMA App. at 46a. The court flatly rejected the contention "that the congressional actions and failures to act described [in its discussion of the legislative history] have no bearing on the agency's freedom to regulate on this question." 680 F.2d at 229, MVMA App. at 47a.

NHTSA's "freedom to regulate," however, is a matter of statutory authorization. "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. [Footnote omitted.]" *Stark v. Wickard*, 321 U.S. 288, 309 (1944). The court's ruling that NHTSA's discretion regarding passive restraints was restricted must have some basis in *enacted* legislation; it must rest on "a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority." *Western Union Telegraph Co.*

v. FCC, 541 F.2d 346, 354 (3d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977).

The Safety Act cannot reasonably be construed to require that NHTSA mandate passive restraints. The provision on motor vehicle safety standards sets forth the criteria which these standards must meet and the manner in which they shall be promulgated, but it does not direct the establishment of any *specific* automobile safety standard. *See* 15 U.S.C. § 1392(a)-(h). By comparison, when Congress intended that certain specific standards be set, it made this clear. Under 15 U.S.C. § 1392(i), for example, Congress mandated the issuance of standards covering eight different aspects of school bus equipment and performance. Congress similarly required NHTSA to establish a standard for automotive fuel system integrity. Pub. L. No. 93-492, § 108, 88 Stat. 1470 (1974). The fact that Congress specifically set forth these exceptions to its general grant of authority over safety standards suggests that "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980).

The legislative history cited by the court does not establish any contrary congressional intent. With one exception which is discussed later (*see* pages 13-14, *infra*, in regard to the Safety Act's 1974 amendments), that history postdates the amended act. "[*P*]*ost hoc* legislative history is entitled to little weight" (*Haire v. Calloway*, 526 F.2d 246, 249 n.4 (8th Cir. 1975), *vacated on other grounds*, 537 F.2d 318 (8th Cir. 1976)) inasmuch as "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960).[3] Even if it

[3] This is especially true with respect to the "less formal types of subsequent legislative history," such as a "mere statement in a conference report." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). The post-1974 history

were true that a subsequent Congress desired that passive restraints be mandated, this would be irrelevant to the construction of the Safety Act. "It is the intent of *the Congress that enacted* [*the law*] . . . that controls." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) (emphasis added).

In ruling that the legislative history establishes "congressional approval" of a contrary "interpretation of the statutes" by NHTSA (680 F.2d at 229, MVMA App. at 47a), an interpretation that *required* NHTSA to impose passive restraints, the Court of Appeals committed a fundamental error. *It mistook NHTSA's earlier mandate of passive restraints to be an act of statutory construction, when in fact it was an exercise of discretionary power.*

None of NHTSA's past pronouncements on Standard 208 contain any serious suggestion that the agency viewed itself as being statutorily *compelled* to mandate passive restraints. The agency's actions on this issue always were, and continue to be, matters of administrative judgment and discretion rather than of legislative command. Thus, in 1972, the Sixth Circuit "conclude[d] that the issue of the relative effectiveness of active as opposed to passive restraints is one which has been duly delegated to the Agency, with its expertise, to make . . . ." *Chrysler Corp.*, 472 F.2d at 675. In 1979, the D.C. Circuit found that "Secretary Adams provided a sufficient explanation why his judgment differed from his predecessor's" and that he had not "abused his discretion" in evaluating air bags. *Pacific Legal Foundation*, 593 F.2d at 1346, 1347.[4] The court's reliance on NHTSA's

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cited by the court could not have been any less formal because, as the court admitted, none of those congressional responses were ever enacted. 680 F.2d at 228, MVMA App. at 46a.

[4] In fact, regulatory issues of this nature generally involve the *broadest* range of administrative discretion:

> "[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashion-

previous passive restraint rule as evidencing some "mandate . . . received from Congress" (680 F.2d at 242, MVMA App. at 74a) is simply misplaced.

NHTSA's power to rescind its passive restraint mandate under 15 U.S.C. § 1392(e) has not been restricted by Congress. As this Court recently stated, "indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981).[5] The unenacted reaction of a subsequent Congress to NHTSA's exercise of statutory power is precisely that—unenacted. It cannot serve to restrict NHTSA's delegated authority.[6] Contrary to the Court of Appeals' assertion, it indeed has "*no* bearing on the agency's freedom to regulate on this question." 680 F.2d at 229, MVMA App. at 47a (emphasis added).

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ing of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives. [Footnote omitted.]" *Niagara Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153, 159 (D.C. Cir. 1967).

It is precisely through such discretionary power that "Congress places a premium upon agency expertise." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966).

[5] In the *St. Martin* case, moreover, the "indefinite congressional expressions" were related to enacted legislation. By comparison, the indefinite congressional expressions upon which the Court of Appeals relied never even became law; in its words, "[n]one of these acts carries the weight of positive law, of course." 680 F.2d at 228, MVMA App. at 46a.

[6] In ruling that a one-house congressional veto is unconstitutional, the District of Columbia Circuit recently stated that

> "rulemaking is substantially a function of administering and enforcing the public law. As such, Congress may not create a device enabling it, or one of its houses, to control agency rulemaking. Congress' duty to oversee agency action is connected with its ultimate power of revising the laws under which the agency operates. The creation of further congressional power violates the Constitution." *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425,

2. *In Fact, Congress Has Not Endorsed the Passive Restraint Standard*

The Court of Appeals stated that "each time Congress reviewed the passive restraint standard it was essentially confirmed." 680 F.2d at 229, MVMA App. at 47a. This alleged uniformity of congressional reaction is belied by every proposal on passive restraints which Congress enacted into law.

1. In 1974, Congress reacted to the ignition interlock fiasco by prohibiting the requirement of these devices under any motor vehicle safety standard. *See* page 5 n.2, *supra*. The resulting amendment to the Safety Act also provided that any future "nonbelt" safety standard could be promulgated only in accordance with specified provisions for public and congressional input. *See* 15 U.S.C. § 1410b, added to the Safety Act by Pub. L. No. 93-492, Title I, § 109, 88 Stat. 1482 (1974). Such a standard would, furthermore, be subject to congressional veto by concurrent resolution. *See* 15 U.S.C. § 1410b(d).[7]

The Court of Appeals treated this episode as one example of the alleged "congressional commitment" to mandatory passive restraints, on the ground that Congress "did not foreclose NHTSA's pursuit of a passive restraint standard." 680 F.2d at 228, MVMA App. at 46a. In fact, however, these 1974 amendments suggest

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471 (D.C. Cir. 1982), *petition for cert. filed sub nom. United States Senate v. Consumer Energy Council of America*, 51 U.S.L.W. 3212 (U.S. Sept. 28, 1982) (No. 82-177).

In relying on unenacted *post hoc* congressional expressions to restrict NHTSA's rule-making discretion, the court has created a new instrument of congressional power which is no less powerful than the one-house veto. At the same time, the informality of this new instrument leaves no doubt as to its illegality.

[7] According to the court, these provisions were adopted as a compromise replacement for a proposal which would have flatly prohibited passive restraints and which the House of Representatives had "passed overwhelmingly." 680 F.2d at 222-23, MVMA App. at 33a-34a.

just the opposite. There was no passive restraint requirement in effect at the time that these amendments were enacted, and the result of the new law was to limit the agency's ability to add such a requirement. In the court's own words, "the 1974 Amendments sharply reduced DOT's discretion to modify Standard 208 in the future." 680 F.2d at 210-11, MVMA App. at 8a.[8]

This limitation on the agency's ability to mandate passive restraints obviously was not a congressional endorsement of the idea. If anything, it suggests exactly the opposite. Yet the court nonetheless included this episode in its claim that "each time Congress reviewed the passive restraint standard it was essentially confirmed." 680 F.2d at 229, MVMA App. at 47a.

2. In both 1978 and 1979, Congress prohibited DOT from using appropriated funds to enforce a passive restraint mandate. Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-335, § 317, 92 Stat. 435, 450 (1978); Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, Title III, § 317(a), 93 Stat. 1023, 1039 (1979).[9] Admittedly, this legislation may

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[8] The court in *Pacific Legal Foundation* characterized the 1974 legislation in nearly identical words, stating that it "limited DOT's discretion to amend Standard 208 in the future." 593 F.2d at 1341.

[9] The relevant provision of the 1978 legislation reads:

"Sec. 317. None of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system).

"Sec. 318. Nothing in section 317 of this title shall be construed to prohibit the use of funds for any research and development activity relating to occupant restraint systems."

The 1979 legislation is practically identical on this point:

"Sec. 317.(a) None of the funds provided in this Act may be used to implement or enforce any standard or regulation which

have been largely symbolic because the mandate was not scheduled to take effect until 1981. 680 F.2d at 225, MVMA at 38a. Nonetheless, it was a disaffirmation of the mandate. Like the 1974 amendments, these two appropriation acts flatly contradict the court's claim that Congress endorsed the mandate each time it reviewed it. Rather, Congress apparently did exactly the opposite.

Only by totally misreading these episodes could the court conclude that the legislative history establishes an almost-but-not-quite congressional approval of Standard 208—in its words, that

> "the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so." 680 F.2d at 222, MVMA App. at 32a.

The court's opinion is replete with references to "the path marked by Congress," "the course that Congress has set," and "the mandate . . . received from Congress" on passive restraints. 680 F.2d at 229, 242, MVMA App. at 48a, 74a. As both the 1974 amendments to the Safety Act and the 1978 and 1979 appropriation acts indicate, Congress has set no such course on this issue. The court accused NHTSA of "err[ing] when it presumes that it knows how to speak more clearly than Congress" (680 F.2d at 235, MVMA App. at 60a), but it is the court which engaged in this presumption. If Congress wishes to require NHTSA to take some specific action on passive restraints, it is perfectly capable of doing so. It has not. The "path marked by Congress" which the court claimed to discern in the labyrinthine legislative history of Standard 208 is, in reality, no more than a trail blazed by the court itself. NHTSA is not required to follow that trail

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requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system).

"(b) Nothing in this section shall be construed to prohibit the use of funds provided in this Act for any research and development activity relating to occupant restraint systems."

in lieu of its own judgment, and it is the height of judicial intrusiveness for the court to order that it do so.

II

IN OVERRULING NHTSA'S ASSESSMENT OF PUBLIC REACTION, THE COURT IMPROPERLY IMPOSED ITS OWN JUDGMENT ON MATTERS UNIQUELY WITHIN THE AGENCY'S EXPERTISE

Having declared that it was NHTSA's burden to justify its departure from the asserted path marked by Congress, the court proceeded to displace NHTSA's judgment on the key issue—the predicted usage rate of detachable automatic belts under a passive restraint mandate.

The court stated that this basic question involved NHTSA's forecast of future events:

> "The rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up." 680 F.2d at 231, MVMA App. at 51a.[10]

The law is clear that in such areas agencies are entitled to even more flexibility than usual in their decision making. "It is important . . . that *greater* discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions." *NAACP*, 682 F.2d at 1001 (citations omitted; emphasis added). In such cases, where an agency's decisions

> "rest on judgment and prediction rather than pure factual determinations . . . . complete factual support for [its] ultimate conclusions is not required, since 'a

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[10] The court upheld NHTSA's explanation of the first two steps in its decision. The first step, NHTSA's "prediction of how industries plan to comply" with the mandate, was characterized by the court as "exactly the sort of factual question on which the agency's expert 'administrative feel' deserves the greatest deference." 680 F.2d at 230, MVMA App. at 50a. The second step, NHTSA's conclusion that "a detachable belt, once detached, is functionally equivalent to a manual belt," was also upheld. *Id.*

> forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' [Footnote omitted.]" *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981), *quoting Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

As is shown below, the Court of Appeals accorded NHTSA no deference whatsoever on its assessment of anticipated belt usage rates; instead, the court engaged in its own reweighing of the evidence.

A. In Rejecting NHTSA's Prediction of Future Belt Usage Rates, the Court Went Beyond Its Proper Reviewing Function and Simply Reweighed the Evidence on Its Own

NHTSA had concluded that, because most car manufacturers would comply with a passive restraint mandate by means of detachable passive belts, it had no reason to believe that these belts would be used to any significantly greater extent than conventional belts. 46 Fed. Reg. 53,423 cols. 1-2, MVMA App. at 104a. While the court agreed with NHTSA's conclusion regarding the anticipated manufacturer response (*see* n.10, *supra*), it scathingly rejected NHTSA's reasoning on the usage rate issue, claiming that the agency had "turned the question on its head and thus totally misdirected its analysis":

> "[T]he question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. *NHTSA has some burden . . . to show* that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so." 680 F.2d at 231, MVMA App. at 51a (emphasis added).

Once again, the court placed the evidentiary burden on NHTSA rather than on those challenging the agency. In determining whether or not to continue to regulate, how-

ever, it is NHTSA's prerogative, and not the court's, to decide how to approach this question. While the agency is required to explain its action, it is not required to adhere to some fixed formulation of the issue.

The court ruled that NHTSA's decision "was supported by no record evidence whatsoever" because "it rested its decision only on 'substantial uncertainty' about [future usage] rates." 680 F.2d at 232, MVMA App. at 53a-54a. It is clear, however, that NHTSA had more than adequate reasons for doubting that detachable belts would produce any significant increase in usage rates.

NHTSA had concluded that the high use rate in the passive belt-equipped Rabbits and Chevettes which have been sold to date was not representative of what would occur under a mandate. This conclusion was based on: (1) the fact that subcompact cars such as Rabbits and Chevettes *generally* exhibit higher than average belt use rates, even when not equipped with passive belts (46 Fed. Reg. 53,421 col. 2, MVMA App. at 97a-98a); (2) the special features of the passive belts in these models which made them generally nondetachable and which would not be present in belts installed under the mandate (*id.* at cols. 2-3, MVMA App. at 97a-99a); and (3) the fact that these Rabbits and Chevettes were being used by people who had *voluntarily* purchased them equipped with passive belts:

> "Having voluntarily invested in automatic restraints, they are more likely to use those restraints than someone who is compelled to buy them." *Id.* at col. 3, MVMA App. at 98a.

On this basis, and given "the lack of any directly relevant data" on the issue (46 Fed. Reg. 53,420 col. 3, MVMA App. at 94a), NHTSA decided that it could not extrapolate from the experience of these Rabbits and Chevettes to the situation under a mandate. According to the court, this "merely left the agency with no data" upon which to predict future use rates. 680 F.2d at 231

n.30, MVMA App. at 52a (emphasis deleted). It is no "mere" matter, however, for an agency to have no data on whether a costly regulation, soon to take effect, will accomplish its purpose. The District of Columbia Circuit has stated that "[i]ndeed, an agency should not continue to regulate unless it can clearly identify the harm it seeks to remedy." *NAACP*, 682 F.2d at 1000-01. It is no less true that NHTSA should not continue to regulate if it cannot assure that a previously chosen remedy will remain effective in the future.[11]

The court also ruled that "NHTSA's reasons for refusing to extrapolate from the available data are extremely weak." 680 F.2d at 231 n.30, MVMA App. at 52a. It reached this conclusion on the basis of its own extensive reweighing of the evidence.[12] But the court can-

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[11] The court's ruling in this regard is seriously undermined by another passage in its decision:

> "If NHTSA was uncertain that Modified Standard 208 would lead to the required usage increase, it could reasonably have decided to suspend or amend the regulation rather than plunge ahead in the blind faith that the standard would succeed. . . . But it is one thing to decide that evidence fails to show the wisdom of continuing with a regulatory program, and quite another to decide that evidence shows the regulatory program should be abandoned altogether." 680 F.2d at 232, MVMA App. at 54a.

There may be some difference between the two approaches described here, but it is not so great as to prevent NHTSA from choosing one over the other. This is especially true in light of NHTSA's statement that it "is still committed" to "its original intent, the widespread offering of automatic crash protection that will produce substantial benefits." 46 Fed. Reg. 53,426 col. 2, MVMA App. at 116a.

[12] The court basically drew its conclusions from opinion surveys of car owners. *See* 680 F.2d at 231 n.30, MVMA App. at 52a-53a. However, the District of Columbia Circuit has previously noted that the discretion to reject data "is peculiarly necessary where the expert evidence consists of the results of a public opinion poll—data that is open to a wide variety of errors." *United States v. Halde-*

not reject administrative inferences solely because it disagrees with them. A "reviewing court does not reweigh the evidence or reject reasonable agency inferences simply because other inferences might also have been reasonably drawn." *Laird v. Interstate Commerce Commission*, 691 F.2d 147, 150 n.4 (3d Cir. 1982) (citations omitted). As this Court has stated,

> "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. [Citations omitted.]" *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

B. The Court Had No Basis for Rejecting NHTSA's Judgment on the Issues of Equity and Unjustifiable Hazard

In NHTSA's judgment, the passive restraint mandate posed a serious problem of equity:

> "Responsible regulatory policy should generally strive to ensure that the beneficiaries of regulation bear the principal costs of that regulation. . . . The automatic restraint requirements of the standard would

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man, 559 F.2d 31, 64 n.43 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

The very terms used by the court in its analysis indicate that NHTSA's decision was rational nonetheless. According to the court, some of NHTSA's reasoning was "undercut" by a staff analysis, its demographic argument was "somewhat, although not totally, negated," and there were "major difficulties" with one of its conclusions. 680 F.2d at 231 n.30, MVMA App. at 52a. Whatever the validity of these characterizations, they do not establish the lack of a reasonable basis for NHTSA's decision. They do, however, demonstrate that the court engaged in precisely the type of intrusive judicial review against which the District of Columbia Circuit has previously warned:

> "[I]t is important that courts not think themselves licensed to embark upon wide-ranging searches for 'clear errors of judgment.'" *Ethyl Corp.*, 541 F.2d at 35 n.74.

> have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint usage." 46 Fed. Reg. 53,424 col. 2, MVMA App. at 109a.

The inequity of this situation called into question the reasonableness of the mandate, a factor which NHTSA was required to consider under 15 U.S.C. § 1392(f)(3) *Id.*

The court summarily dismissed this concern on the ground that current manual belt users might realize insurance savings under the mandate. *See* 680 F.2d at 240 & n.43, MVMA App. at 70a. It did so despite NHTSA's judgment that offsetting insurance discounts "would not likely materialize on a general basis,"—a judgment based in part on the reluctance of many insurance companies to reduce their current rates for cars with passive restraints. 46 Fed. Reg. 53,423 col. 3, MVMA App. at 106a. The court's own factual finding involved only the *possibility* of insurance premium benefits to current belt users (*see* 680 F.2d at 240 n.43, MVMA App. at 70a), yet this eventuality nonetheless served, *sub silentio*, to displace the deference owed to NHTSA on an issue of disputed fact.

The costs at issue were not merely financial. NHTSA had rejected the alternative of requiring use-inducing features on passive belts because this might create a new hazard in complicating the evacuation of cars involved in accidents. The agency was "unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would". 46 Fed. Reg. 53,424 col. 3, MVMA App. at 110a.

The court, however, judged the issue strictly as one of cost-benefit analysis. In its view, the

> "regulatory problem facing NHTSA was therefore simple in theory . . . . It had to predict the savings that would result from Modified Standard 208, and compare that savings with the cost of the standard, so as to conduct 'a "commonsense" balancing of safety benefits and economic cost.' [Citation omitted.]" 680 F.2d at 214-15, MVMA App. at 17a.

The question of whether the mandate would create new safety hazards was irrelevant to the court, except to the extent that it entered into this cost-benefit analysis:

> "There is no evidence to support the suggestion that 'further complicat[ing] the extrication' of occupants after collisions, if that occurs at all, *will not be more than offset* by the advantages of increased belt use." 680 F.2d at 236, MVMA App. at 61a-62a (emphasis added).

The creation of new safety hazards, however, is an extremely sensitive issue regardless of whether these hazards are offset by other factors. It is uniquely within NHTSA's expertise, encompassed by its "authority to balance present injuries against possible risks posed by safety equipment." *Pacific Legal Foundation*, 593 F.2d at 1346. It is not an issue which can be judicially usurped merely on the basis of an asserted cost-benefit balance.[13]

C. NHTSA Was Fully Entitled To View the Ignition Interlock Episode as Relevant to Passive Restraints

It was NHTSA's position that Standard 208 could trigger an adverse public reaction similar to that which occurred during the ignition interlock fiasco. NHTSA believed that such a reaction could be disastrous for other agency measures by producing "a poisoning of popular sentiment toward efforts to improve occupant

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[13] For the reasons fully stated in the briefs of DOT and MVMA, the court's ruling on NHTSA's consideration of alternatives, and on an effective date for Standard 208, should also be reversed by this Court.

restraint systems in the future." 46 Fed. Reg. 53,424 col. 2, MVMA App. at 108a (citation omitted). In the agency's judgment,

> "[n]o regulatory policy is of lasting value if it ultimately proves unacceptable to the public. Public acceptability is at issue in any vehicle safety rulemaking proceeding in which the required safety equipment would be obtrusive, relatively expensive and beneficial only to the extent that significant portions of the motoring public will cooperate and use it. Automatic belt requirements exhibit all of those characteristics." 46 Fed. Reg. 53,424 col. 1, MVMA App. at 107a.

The court dismissed all of this, claiming that "NHTSA's discussion of the interlock is absolutely irrelevant . . . ." 680 F.2d at 234, MVMA at 59a.

NHTSA's assessment of public acceptability was part of its legal obligation under the Safety Act—"the agency cannot fulfill its statutory responsibility unless it considers popular reaction." *Pacific Legal Foundation*, 593 F.2d at 1345. In fact, NHTSA evaluated this issue in a manner identical to that of an earlier Secretary, William T. Coleman, Jr., who had preceded former Secretary Brock Adams. In 1976, Secretary Coleman had decided against mandating passive restraints because of this same likelihood of adverse public reaction. C.A.J.A. 2119-24. As the court in *Pacific Legal Foundation* noted, "Coleman's view of the likely public reaction to passive restraints . . . *had been based largely on the ignition interlock episode.*" 593 F.2d at 1342 (footnote omitted; emphasis added). While Secretary Adams had "squarely rejected" this view soon after taking office (*id.*), this was still "a matter of judgment" for each Secretary to resolve. *Id.* at 1346.

A new administrator has now rejected the view taken by Secretary Adams. But according to the court, what was formerly a matter of judgment now has "absolutely

no evidence to support" it. 680 F.2d at 234, MVMA App. at 59a. Ignoring the decision of Secretary Coleman while it wholeheartedly embraced Secretary Adams' view (*see id.* at n.33, MVMA App. at 59a), the court categorically asserted that "every indication in the record points the other way." *Id.* at 234, MVMA App. at 59a.

The court similarly rejected NHTSA's characterization of mandatory passive restraints as "people-forcing." *See* 680 F.2d at 240 n.43, MVMA App. at 70a. There are two very reasonable views on this question. One is that passive belts do not "force" anything upon people precisely because these devices are automatic. The other no less reasonable view is that a mandate obviously "forces" people into literally being encircled by seat belts. While the court may be entitled to its view (it chose the former), it was certainly not empowered to impose it on NHTSA.

III

THIS COURT SHOULD UPHOLD NHTSA'S DECISION RATHER THAN REMAND IT FOR FURTHER PROCEEDINGS ON THE MERITS

This Court has often stated that it will intervene in appellate reviews of agency rule making "only in what ought to be the rare instance when the standard [of review] appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491 (1951); *see, e.g., American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 523 (1981); *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 309-10 (1974). For the reasons previously set forth in this brief, we submit that this is such a case. The court below, however, did not limit its decision to the particular standard of review which it employed. It went on to declare that "[b]y *any* measure of reasoned decisionmaking, NHTSA's action was arbitrary and capricious." 680 F.2d at 239, MVMA App. at 68a (emphasis added). According to the

court, there was "not one iota of evidence" in the record to support NHTSA's decision, and the agency had presented "[n]o logical reason" for its action. *Id.* at 231, MVMA App. at 51a. These statements suggest that the outcome of a remand to the court under some other standard of review may be already predetermined.

While it is not the Supreme Court's "responsibility to assess the record to determine whether agency findings are supported" (*Mobil Oil Corp.*, 417 U.S. at 309), this Court has nonetheless engaged in such analysis on occasion. *See, e.g., Bowman Transportation,* , 419 U.S. at 292 (wherein the Supreme Court, in overturning a district court's invalidation of Interstate Commerce Commission findings, stated that it did "not find the Commission's treatment of the evidence arbitrary"); *Gainesville Utilities Department v. Federal Power Commission*, 402 U.S. 515, 529 (1971) (wherein the Court overturned a Fifth Circuit decision and ruled "that substantial evidence supports the findings of the Commission"); *American Federation of Musicians v. Carroll*, 391 U.S. 99, 106 (1968) (wherein this Court, in overturning an appellate reversal of a district court decision, ruled that the district court's findings "have substantial support in the evidence . . . ."). Given that this case is before this Court, and given the extent to which the substantive issues lie within the special expertise of the agency, and given the lower court's suggestion that its judgment would be the same under any standard of review, we submit that this Court should itself uphold NHTSA's decision under the proper arbitrary and capricious test.

CONCLUSION

The Court of Appeals' decision constitutes a gross misapplication of the law on both appellate review and the use of legislative history. The court relied on *post hoc*, unenacted congressional reaction to restrict NHTSA's authority to regulate. It constructed a congressional mandate where none existed. On the basis of NHTSA's alleged deviation from this mandate, the court proceeded

to substitute its judgment for that of the agency on matters uniquely committed to administrative discretion.

For this reason, and for the other reasons set forth above, the decision of the Court of Appeals should be reversed and NHTSA's decision upheld on the merits.

Respectfully submitted,

RONALD A. ZUMBRUN
PACIFIC LEGAL FOUNDATION
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN, *Counsel of Record*
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners
Consumer Alert and
Pacific Legal Foundation

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In the Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

REX E. LEE
Solicitor General
J. PAUL MCGRATH
Assistant Attorney General
KENNETH S. GELLER
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT E. KOPP
MICHAEL F. HERTZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANK BERNDT
Chief Counsel
STEPHEN P. WOOD
DAVID W. ALLEN
Assistant Chief Counsels
ENID RUBENSTEIN
HUGH F. OATES
EILEEN T. LEAHY
SHIRLEY RANSOM
Attorneys
National Highway Traffic Safety Administration
Department of Transportation
Washington, D.C. 20590

QUESTIONS PRESENTED

1. Whether an agency acts arbitrarily and capriciously in rescinding a rule that has not yet taken effect, when changed circumstances leave substantial uncertainty that the rule will produce the benefits on which its initial promulgation was premised, and such uncertainty would have permitted the agency to decline to issue the rule in the first instance.

2. Whether the National Highway Traffic Safety Administration (NHTSA) acted arbitrarily and capriciously in rescinding the particular requirement in Motor Vehicle Safety Standard 208 that new vehicles produced after September 1982 be equipped with passive restraints for occupants, based on NHTSA's inability to find that the requirement would satisfy the statutory criteria for a motor vehicle safety standard, without first considering whether other versions of a passive restraint standard would be appropriate.

3. Whether, even if the passive restraint requirement of Standard 208 was not validly rescinded, the court of appeals exceeded the proper limits on judicial review by ordering that requirement into effect on September 1, 1983, without first affording NHTSA an opportunity to conduct further proceedings on remand or to exercise the authority conferred on the Secretary by 15 U.S.C. 1392(c) and (e) to establish a new effective date for the Standard.

LIST OF PARTIES BELOW

State Farm Mutual Automobile Insurance Co., Kent Mason, Patricia Warren, Leorlin Boyd, National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung were petitioners in the proceedings below. The Department of Transportation, Secretary of Transportation Drew Lewis, the National Highway Traffic Safety Administration, and NHTSA Administrator Raymond A. Peck, Jr. were respondents below. Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., Automobile Importers of America, Inc., Consumer Alert, Pacific Legal Foundation, and Albert B. Lewis, Superintendent of Insurance for the State of New York, were intervenors below.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-354

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

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STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

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STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The June 1, 1982 opinion of the court of appeals (Pet. App. 1a-76a)[1] is reported at 680 F.2d 206. The August 4, 1982 supplemental order and memorandum of the court of appeals (Pet. App. 79a-82a) are not reported.

JURISDICTION

The jurisdiction of the court of appeals rested on 15 U.S.C. 1394(a)(1). The judgment of the court of appeals (Pet. App. 160a-161a) was entered on June 1, 1982, and the supplemental order of the court of appeals (Pet. App. 79a-80a) was entered on August 4, 1982. The petitions for a writ of certiorari in Nos. 82-354 and 82-355 were filed on August 30, 1982. On August 24, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 82-398 to and including September 8, 1982, and the petition was filed on that date. The petitions for a writ of certiorari were granted on November 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 1394(a)(4).

STATUTORY PROVISIONS INVOLVED

Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392, and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706, are set forth in pertinent part in the Appendix, *infra*, 1a-2a.

STATEMENT

1. In 1966 Congress enacted the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. (& Supp. V) 1381 *et seq.* (hereinafter "Safety Act"), for the purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. To accomplish this goal, the Act directs the Secretary of

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 82-354.

Transportation[2] to issue appropriate federal motor vehicle safety standards (15 U.S.C. 1392(a)) and prohibits the manufacture, sale, or delivery into commerce of any motor vehicle that is not in conformity with such standards. 15 U.S.C. 1397.

The Act provides that each motor vehicle safety standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a). In addition, the Secretary must consider whether any proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle and "the extent to which such standards will contribute to carrying out the purposes of [the Act]." 15 U.S.C. 1392(f) (3) and (4). The Act also grants the Secretary authority to "amend or revoke any Federal motor vehicle safety standard" (15 U.S.C. 1392(e); see also 15 U.S.C. 1407).

2. a. In 1967, the Secretary promulgated Federal Motor Vehicle Safety Standard 208, which required the installation of seat belts in all cars. 32 Fed. Reg. 2408, 2415. In 1969, the Department of Transportation announced that it was considering the initiation of rulemaking proceedings to require installation of inflatable airbags or other "passive occupant restraint systems"—devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle. 34 Fed. Reg. 11148. The Department formally proposed such a standard in 1970. 35 Fed. Reg. 7187.

Between 1970 and 1972, after lengthy administrative proceedings, the Secretary issued a series of orders culminating in an amendment to Standard 208 requiring full passive protection for all front seat occupants of vehicles manufactured after August 15, 1975. The Standard permitted optional means of compliance for vehicles built between August 1973 and August 15, 1975. Such vehicles

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[2] The Secretary's general authority under the Safety Act has been delegated to the Administrator of the National Highway Traffic Safety Administration (hereinafter "NHTSA"). 49 C.F.R. 1.50(a).

could have (i) full passive protection; (ii) partial passive protection, with lap belts for front seat occupants; or (iii) manual lap and shoulder belts coupled with an ignition interlock to prevent the car from starting unless the occupants' belts were fastened. See 35 Fed. Reg. 16927 (1970); 36 Fed. Reg. 4600 (1971); *id.* at 19254; *id.* at 19266; 37 Fed. Reg. 3911 (1972); Pet. App. 6a-8a.[3]

On petitions for review, the United States Court of Appeals for the Sixth Circuit upheld the agency's decision to require passive restraints as a "proper exercise of its administrative discretion." *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 674 (6th Cir. 1972).[4] The court concluded, however, that the testing procedures required for passive restraints did not satisfy the Act's requirement that a standard be "objective."

The Sixth Circuit's decision did not invalidate the manual belt and interlock option.[5] However, public irritation

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[3] Full passive protection required the meeting of performance criteria for frontal, side, and rollover crashes without instrument-measured injury to a test dummy, while partial passive protection required the meeting of the same performance criteria for frontal crashes only. 37 Fed. Reg. 3911 (1972).

[4] The Sixth Circuit stressed that if it appeared as the time for implementation approached that further testing or development was necessary, the agency was free to consider "whether to extend the time for implementation or to alter, or even to abandon, the project." 472 F.2d at 673.

[5] The interlock option was added after adoption of the version of the Standard that was under review in *Chrysler*. However, in a subsequent decision, the Sixth Circuit held the crash test and injury criteria invalid for the manual belt and interlock option as well. *Ford Motor Co.* v. *National Highway Traffic Safety Administration*, 473 F.2d 1241 (1973). As contemplated by the *Ford Motor* decision (473 F.2d at 1244), NHTSA then deleted the crash test and injury criteria from the manual belt and interlock option, thereby effectively requiring installation of manual belts and ignition interlocks beginning on August 15, 1973. 38 Fed. Reg. 16072 (1973).

In August 1973, the agency corrected the test dummy specifications "for the limited purpose of evaluating vehicles with passive restraint systems manufactured under the first and second re-

with interlock systems led Congress in 1974 to amend the Safety Act to prohibit any motor vehicle safety standard from requiring or permitting compliance by means of an ignition interlock or a continuous buzzer designed to indicate that safety belts are not in use. 15 U.S.C. 1410b(b)(1); see Pet. App. 8a; 120 Cong. Rec. 27815-27823, 35036 (1974). The 1974 statutory amendment also provided that any safety standard requiring compliance by means of an occupant restraint system other than a belt system, such as inflatable airbags, would be subject to a two-House legislative veto. 15 U.S.C. 1410b(b)-(d).

NHTSA had concluded the previous April that to permit emergency egress after an accident, passive belts—belts that move into place automatically when the occupant closes the door—should have a release mechanism in the form of a conventional latch, accompanied by an ignition interlock and warning buzzer to encourage reattachment. 39 Fed. Reg. 14593 (1974). In view of the 1974 statutory amendment, however, NHTSA eliminated the ignition interlock and buzzer aspect of the emergency detachment requirement. Pet. App. 9a-10a; 39 Fed. Reg. 38380 (1974). In addition, in response to the *Chrysler* decision and the 1974 legislation, NHTSA extended the optional alternatives for compliance with Standard 208 until August 31, 1976. 40 Fed. Reg. 16217, 33977 (1975).

b. On June 9, 1976, Secretary Coleman initiated a new rulemaking proceeding on the passive restraint issue. 41 Fed. Reg. 24070 (1976). After hearing testimony and reviewing written comments, Secretary Coleman extended the optional alternatives indefinitely, because of his expectation that there would be widespread public resist-

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straint options between August 15, 1973 and August 15, 1975." 38 Fed. Reg. 20449. The notice stated that the question of restraint requirements after August 15, 1975 was still open and would be addressed in future rulemaking (*ibid.*). Only a very limited number of vehicles were expected to be fitted with full or partial passive protection during this interim period (*ibid.*).

ance to mandatory passive restraints. 42 Fed. Reg. 5071 (1977); C.A. App. 2002.[6] He instead proposed a demonstration project involving up to 500,000 cars installed with passive restraints, in order to smooth the way for public acceptance of any mandatory passive restraint standard at a later date. Pet. App. 10a; C.A. App. 2061, 2073-2074.

c. In July 1977, Secretary Adams decided to dispense with the demonstration project developed by Secretary Coleman and instead adopted Modified Standard 208, at issue here. The Modified Standard mandated the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars by model year 1984. The two principal systems that would satisfy the Standard were airbags and passive belts,[7] leaving to the manufacturers the choice of which system to install. 42 Fed. Reg. 34296 (1977).[8] On petitions for review, the

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[6] "C.A. App." refers to the Joint Appendix in the court of appeals, which contains the pertinent materials from the voluminous administrative record, as designated by the parties. The parties have lodged with the Clerk of this Court 15 copies of the Joint Appendix in the court of appeals.

[7] Two manufacturers have offered automatic belt systems as options on their vehicles for some time. In model years 1975-1981, Volkswagen sold more than 300,000 Rabbits equipped with detachable automatic belts having an ignition interlock and a continuous buzzer to discourage detachment. Pet. App. 18a n.12. (Installation of these use-compelling features was permissible under 15 U.S.C. 1410b(b)(1) because the devices were not installed as a means of compliance with Standard 208). Between 1978 and 1980, General Motors sold approximately 20,000 Chevettes with automatic belts. For the 1978 and 1979 model years, the belts were coupled with interlock devices similar to those in the Volkswagen Rabbits; for the 1980 model year, the vehicles had a nondetachable continuous belt system, which permitted the belt to "play out" from a spool to permit emergency egress. Only 13,000 of 415,000 Chevettes purchased in model year 1980 were equipped with these belts, even though the option was made available at no charge to purchasers and dealers received bonuses for selling them (C.A. App. 403).

[8] At the time of Secretary Adams' decision, the passive seat belt option continued to include the requirement that the belt be detachable to permit emergency release. In November 1978, however,

United States Court of Appeals for the District of Columbia Circuit sustained the validity of Modified Standard 208. The court of appeals found Secretary Adams' decision that airbags would be effective "rational," recognized that public resistance to passive restraints was a factor that had to be considered and presented a "matter of judgment" for the Secretary, and held that the Secretary had not "abused his discretion" in assessing the tradeoffs between the expected benefits and potential dangers of airbags. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1344, 1346-1347 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

d. In February 1981, Secretary Lewis proposed a one-year postponement of the effective date of Modified Standard 208 to permit further study in light of changed circumstances since it was promulgated in 1977. 46 Fed. Reg. 12033; C.A. App. 1622. Two months later, NHTSA issued a final rule ordering a one-year delay, until September 1982, in the application of the Modified Standard to large cars. 46 Fed. Reg. 21172; C.A. App. 1272. In a notice published the same day, the Secretary proposed and requested comment on four possible revisions of the Standard: (1) reversal of the phase-in sequence to require compliance by small cars first; (2) simultaneous compliance by all cars; (3) rescission of the passive restraint requirement; and (4) deletion of a requirement for passive restraints in the front center seating position. 46 Fed. Reg. 21205; Pet. App. 147a-159a; C.A. App. 12-15.

After receiving written comments and holding public hearings, NHTSA issued a final rule on October 23, 1981 amending Modified Standard 208 to delete the requirement that passive restraints be installed, while permitting their installation as an optional means of compliance (see

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NHTSA amended the Standard to afford manufacturers for the first time the option of making automatic belts either detachable or nondetachable. 43 Fed. Reg. 52493; C.A. App. 1705. As explained in footnote 7, *supra*, General Motors made the nondetachable, or "continuous," belt option available in the 1980 model year Chevettes, with only limited success.

note 29, *infra*). NHTSA explained that it had a duty under the Act "to review the automatic restraint requirements in light of changing events and to ensure that the requirements continue to meet the criteria which each Federal Motor Vehicle Safety Standard must satisfy" (Pet. App. 93a).[9] On the basis of its thorough review, NHTSA determined that it was "incapable of finding now, as it was able to do in 1977, that the automatic restraint requirements would meet all of the applicable criteria in the Vehicle Safety Act" (*ibid.*):

i. NHTSA noted that its determination in 1977 that the Standard would produce significant safety benefits depended on several "critical assumptions" (Pet. App. 94a-95a), the validity of which had been "substantially if not wholly undermined by drastic changes in the types of automatic restraints that would have been installed under the automatic restraint requirements" (*id.* at 96a). First, although the agency had assumed in 1977 that airbags would be installed in 60% of all new cars and automatic seat belts in 40%, it concluded that because of the change to small cars, manufacturers planned to install automatic seat belts in approximately 99% of the new cars. "Thus, the assumed life-saving potential of air bags would not have been realized" (*ibid.*).

Second, the agency determined that the automatic belts installed in the "overwhelming majority of new cars" would have been detachable. This design choice stemmed in part from the manufacturers' desire not to impede emergency exit and in part from their concern that a significant number of people would resist belts not having this feature because of a fear of being trapped (Pet. App. 97a, 99a, 11a; see C.A. App. 305, 363, 431, 435, 595, 653, 1220, 2549). NHTSA concluded that detachable belts "would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently" and that their use "thereafter requires the

[9] NHTSA also stated that the review was undertaken to ensure that the Standard met the requirements of cost-effectiveness provided by Exec. Order No. 12991, 46 Fed. Reg. 13193 (1981).

same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts" (Pet. App. 97a-98a; see C.A. App. 406, 431, 806, 1253).

Third, NHTSA found that although surveys of the use of automatic belts in Volkswagen Rabbits and Chevrolet Chevettes (see note 7, *supra*), conducted since Modified Standard 208 was promulgated in 1977, indicated usage rates as high as 70% or 80%, these studies suffered from a number of limitations that rendered them unreliable as bases for predicting the usage of the detachable belts that would be installed to comply with Modified Standard 208 if it went into effect: (1) the belts surveyed either had an ignition interlock or were continuous nondetachable belts and thus were dissimilar to detachable belts; (2) the cars that were the subjects of the studies were not typical of the Nation's automobile fleet generally, because a combination of owner demographics and driver risk perception ordinarily results in higher usage rates in smaller cars; (3) most purchasers of the cars surveyed voluntarily invested in the passive restraints; and (4) crash data for Rabbits revealed a significantly lower actual usage rate than that indicated by the surveys (Pet. App. 97a-104a; see C.A. App. 405-406, 555, 1220).

Recognizing that extrapolation from these "extremely sparse factual data * * * necessarily involve[s] exercises of discretion and informed judgment" (Pet. App. 103a), the agency concluded that the manufacturers' plans to satisfy Modified Standard 208 by installing detachable belts that so closely resembled the manual belts then in use had left it without a basis for reliably predicting the likelihood that the Standard would lead to any significant increased usage of restraints at all (*id.* at 99a, 104a). NHTSA observed in this regard that none of the participants in the rulemaking proceedings had presented any new factual data to reduce the "substantial uncertainty" confronting the agency (*id.* at 101a). In view of this uncertainty regarding the incremental safety benefits of detachable automatic belts, NHTSA could not

find that the automatic restraint requirement of Modified Standard 208 would meet the need for safety (*id.* at 104a), one of the criteria a safety standard must satisfy. See 15 U.S.C. 1392(a).

ii. NHTSA also concluded that in view of the possibly minimal safety benefits and the substantial cost of implementation, the automatic restraint requirement did not satisfy the statutory mandates that a standard be "reasonable" and "practicable" (Pet. App. 88a, 105a). The agency found that imposition of the passive restraint requirement would produce an annual nationwide price effect of approximately $1 billion, without any assurance that consumers would receive offsetting discounts on insurance premiums in the foreseeable future (*id.* at 105a, 106a, 117a; see C.A. App. 190, 1241-1242, 1349, 2550-2552).[10]

The agency "[did] not believe that it would be reasonable to require car manufacturers or consumers to bear such substantial costs without more adequate assurance that they will produce benefits" (Pet. App. 106a). Those costs were "particularly unreasonable," NHTSA explained, given the likelihood that other alternatives, such as its planned educational campaign to increase usage of manual belts, could accomplish the goal of increased usage at "greatly reduced costs" (*id.* at 107a; see *id.* at 111a-112a). An educational effort, NHTSA reasoned, has the advantage of reaching not only those purchasers of new cars who are likely to utilize passive restraints, but also persons driving in cars already on the road (*id.* at 111a-112a).[11]

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[10] In addition, NHTSA estimated that Modified Standard 208 would entail additional fuel costs of up to $150 million annually (Pet. App. 106a, 117a; C.A. App. 208).

[11] A related factor was equity in the distribution of costs: "The automatic restraint requirements of the standard would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may

iii. In addition, NHTSA concluded that the automatic restraint requirement might have an adverse effect on the public's attitude toward safety—an element of the statutory mandates that a standard be "practicable" (Pet. App. 93a) and "meet the need for motor vehicle safety" (*id.* at 114a). Given the obtrusiveness, relative expense, and potentially limited benefits of detachable belts, NHTSA feared that many consumers would regard the automatic restraint requirement as an expensive example of ineffective regulation (*id.* at 108a). These factors, NHTSA reasoned, could lead to a "poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future" (*ibid.*, quoting Secretary Coleman's 1976 Decision, C.A. App. 2073) and adversely affect public attitudes toward safety measures in general (*ibid.*). Moreover, NHTSA observed that some dissatisfied consumers might even "cut the automatic belts out of their cars, thus depriving subsequent owners of the cars of the protection of any occupant restraint system." In NHTSA's view, these were "serious concerns for an agency charged by statute with taking steps appropriate for addressing safety problems that arise not only in the short term but also the long term" (*id.* at 108a-109a). See also *id.* at 114a-115a.

iv. The agency also rejected the option of requiring that all automatic belts have some use-compelling feature—*e.g.*, an ignition interlock to compel refastening of a detachable belt or installation of nondetachable passive belts. NHTSA noted that it lacked statutory authority to require ignition interlocks (see 15 U.S.C. 1410b(b)(1)) and that the history of congressional reaction to interlocks suggested "that Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt system" (Pet. App. 109a-110a). NHTSA further explained that a use-compelling feature could actually be counterproductive because of a "widespread, latent and irrational fear in many members

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or may not be induced by the automatic restraints to commence regular restraint usage" (Pet. App. 109a).

of the public that they could be trapped by the seat belt after a crash" (*id.* at 110a), a fear that might contribute to the decision of many persons not to wear a seat belt at all (*ibid.*). In the agency's view, it would be "highly inappropriate" to impose a technology that might aggravate that fear without first attempting a thorough education of the public (*ibid.*). In addition, NHTSA was "unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would" (*ibid.*).

v. NHTSA stressed that its rescission of the passive restraint requirement at this time did not foreclose the option of reopening rulemaking in the future, depending upon further experience in the usage of manual and automatic belts and the degree of increased public understanding and acceptance of the need for use-inducing or automatic protection alternatives (Pet. App. 115a-116a). NHTSA also noted its regret that Secretary Coleman's proposed demonstration project and accompanying educational campaign had never been placed into effect, so that the experience of those efforts would now be available (*id.* at 110a-111a). Accordingly, the agency expressed its intention to undertake an educational campaign in cooperation with the States and private sector and to initiate efforts with automobile manufacturers to ensure that potential developments in automatic crash protection technology would not be lost (*id.* at 107a, 111a-112a, 115a-116a, 117a-118a).[12]

3. On petitions for review, the United States Court of Appeals for the District of Columbia Circuit held that NHTSA's rescission of the automatic restraint require-

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[12] On October 25, 1982, NHTSA published a request for proposals for an airbag demonstration project to design, fabricate, and evaluate a kit for retrofitting the automobiles of one or more state police fleets with airbags. Commerce Business Daily, Oct. 25, 1982, at 1, col. 2. In addition, NHTSA has entered into an agreement with the General Services Administration for the purchase by the federal government of 5,000 1985 model year vehicles equipped with airbags. Wall Street Journal, Dec. 15, 1982, at 17.

ment was arbitrary and capricious. The court of appeals remarked that "rescission more resembles agency refusal to act than an agency decision to act" and that it is "only in the rarest and most compelling circumstances that courts overturn an agency's ' "expert" determination not to pursue a particular program or policy at a given time' " (Pet. App. 25a, quoting *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818-819 (D.C. Cir. 1981)). In this case, however, the court concluded that NHTSA's discretion to rescind the passive restraint requirement had been restricted by congressional "reaction" to the passive restraint issue, even though the court acknowledged that in none of the instances upon which it relied did that reaction take the form of "positive law" (Pet. App. 46a). The court found that NHTSA's action within this narrowed ambit of discretion was arbitrary and capricious for two general reasons:

a. The court found insufficient as a basis for rescission NHTSA's conclusion that it could not reliably predict an increase in usage under the Standard as written (Pet. App. 50a-54a). The Court expressly accepted as reasonable the first two of the three findings upon which NHTSA relied in reaching this conclusion: that most manufacturers planned to install detachable belts and that a detachable belt, once detached, is "functionally equivalent" to a manual belt (*id.* at 50a-51a). With respect to the third of NHTSA's findings, the court similarly conceded that there may well be "substantial uncertainty" about the increase in seatbelt usage rates that can be predicted if detachable belts are widely used (*id.* at 51a). But the court did not find this uncertainty to be a sufficient basis for NHTSA's action. The appropriate question in the court's view was not whether there was evidence showing that usage rates actually would increase by an amount necessary to justify the Standard, but rather whether NHTSA could point to evidence affirmatively showing that usage rates would *not* increase by such an amount (*ibid.*).

The court found that the evidence in the record did not sustain what it held to be NHTSA's burden on this issue. Moreover, the court reasoned that if experience with passive belts now in use could not be the basis for predicting usage rates under the Standard, "then only a well justified refusal to seek more evidence could render rescission non-arbitrary" (Pet. App. 52a-53a).

b. A majority of the panel also concluded that the rescission of the passive restraint requirement was arbitrary and capricious because NHTSA did not sufficiently consider certain alternatives to rescission (Pet. 54a-68a).[13] The court stressed that NHTSA was "impressively thorough and careful" in reviewing the three alternatives to rescission that it had set forth in its April 1981 Notice of Proposed Rulemaking: reversing the sequence of compliance, ordering simultaneous compliance, and exempting the front center seating position (Pet. App. 55a). But the court believed that other alternatives should have been considered as well.

The court first faulted NHTSA's consideration of the possibility of requiring manufacturers to install nondetachable rather than detachable, automatic belts. The court questioned whether detachable belts are "passive" restraints if, upon detachment, they resemble manual belts (Pet. App. 57a). In addition, the court found insufficient the reasons given by the agency for declining to permit only nondetachable continuous belts—the congressional reaction in 1974 to ignition interlocks, another use-compelling feature; the fear of many members of the public of being trapped; and NHTSA's determination that the cause of safety would not be advanced by a device that might make it more difficult to extricate the occupant after an accident (*id.* at 60a-62a).

The court also held that NHTSA should have considered whether to require the installation of airbags (Pet. App. 62a-65a). The court acknowledged, however,

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[13] Judge Edwards did not accept the majority's discussion of possible alternative courses of action as a basis for decision in this case (Pet. App. 75a).

that the cost of airbags ranged from $200 to $1000 per unit, depending upon economies of scale, and that NHTSA had considered these costs in its regulatory impact analysis (*id.* at 65a-66a).

c. Although the court of appeals invalidated NHTSA's rescission of the automatic restraint provisions of Modified Standard 208, the court expressly declined the suggestion of respondents State Farm and NAII that the standard take effect by September 1982 or September 1983 (Pet. App. 72a). The court noted that manufacturers needed sufficient lead time to implement the passive restraint requirement and that its decision did not foreclose NHTSA from rescinding, suspending, or delaying the requirement in the future (*id.* at 53a-54a, 72a-74a). The court allowed NHTSA 30 days "in which to submit a schedule for resolving the questions raised in [the] opinion, leading either to the rescission or suspension of the standard or to a judicially approved schedule for the effective implementation of * * * [Modified Standard 208] or an amended standard" (*id.* at 74a; see also *id.* at 72a).

On July 1, 1982, NHTSA filed with the court of appeals a suggested Notice of Proposed Supplemental Rulemaking setting forth a schedule for seeking comments from interested parties on questions raised by the court's opinion and for issuing a supplemental decision on those questions (Pet. App. 132a-146a). In a memorandum issued on August 4, 1982, the court stated that NHTSA's proposal was "not inconsistent with the Court's order" (*id.* at 82a). Nonetheless, the court, sua sponte, issued an order on August 4, 1982, staying the compliance date for the passive restraint requirement only until September 1, 1983. The order permitted NHTSA until October 1, 1982 to advise the court whether that compliance date was achievable or whether a longer period was required, "setting forth adequate reasons therefor" (*id.* at 79a-80a).

NHTSA informed the court on October 1, 1982 that, based on representations by manufacturers, it did not ap-

pear that practicable compliance could be achieved before September 1985 (82-354 Pet. Br. App. 44). The court of appeals has not acted in response to NHTSA's filing. However, on November 18, 1982, after this Court granted the petitions for a writ of certiorari, the court of appeals entered an order recalling its mandate (J.A. 16-17).

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. (& Supp. V) 1381 *et seq.*, empowers the Secretary of Transportation to establish motor vehicle safety standards to accomplish the Act's purposes of reducing traffic accidents and deaths and injuries resulting from such accidents. 15 U.S.C. 1381 and 1392(a). Congress provided, however, that any such standard must satisfy certain criteria: it must be "appropriate," "practicable," and "stated in objective terms" and "meet the need for motor vehicle safety," 15 U.S.C. 1392(a), and it must be "reasonable, practicable and appropriate" for each type of vehicle to which it applies. 15 U.S.C. 1392(f)(3).

The Act does not contemplate that a standard once found to satisfy the statutory criteria must remain in effect permanently. To the contrary, 15 U.S.C. 1392(e) expressly provides that the Secretary "may by order amend or revoke any Federal motor vehicle safety standard established under this section." It is evident from the structure and purposes of the Act as a whole that the same statutory criteria that govern the promulgation of a standard in the first instance must inform the Secretary's determination whether the standard should remain in effect or should instead be amended or revoked. 15 U.S.C. 1392(a) and (f). Neither the court of appeals nor respondents have suggested otherwise. NHTSA adhered to these principles in rescinding the passive restraint requirement of Modified Standard 208, concluding that it could no longer find that the Standard would satisfy the

requirements that a standard "meet the need for motor vehicle safety" and be "reasonable" and "practicable."

Under 15 U.S.C. 1392(b), the provisions of the Administrative Procedure Act apply to judicial review of all orders issued by the Secretary establishing, amending, or revoking a safety standard. Because the Safety Act does not require that motor vehicle safety standards or rules amending or revoking such standards "be made on the record after opportunity for an agency hearing" (5 U.S.C. 553(c)), NHTSA is free to follow the notice and comment procedures for informal rulemaking under the APA, 5 U.S.C. 553, as it did in this case, rather than the formal rulemaking procedures prescribed by 5 U.S.C. (& Supp. V) 556 and 5 U.S.C. 557.[14] Accordingly, as the court of appeals held (Pet. App. 25a-26a), and as respondents concede (State Farm Br. in Opp. 9-10; NAII Br. in Opp. 5-6), an order establishing, amending, or revoking a motor vehicle safety standard is subject to judicial review under the APA only to the extent of ensuring that NHTSA's action was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-803 (1978); *Camp* v. *Pitts*, 411 U.S. 138, 140-141 (1973).[15]

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[14] H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966); S. Rep. No. 1301, 89th Cong., 2d Sess. 7 (1966); 112 Cong. Rec. 21487 (1966) (remarks of Sen. Magnuson); *Automotive Parts & Accessories Association* v. *Boyd*, 407 F.2d 330, 332-337 (D.C. Cir. 1968). Compare *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

[15] See *Pacific Legal Foundation* v. *Department of Transportation*, *supra*, 593 F.2d at 1343; *National Tire Dealers & Retreaders Association, Inc.* v. *Brinegar*, 491 F.2d 31, 35 (D.C. Cir. 1974); *Automotive Parts & Accessories Association* v. *Boyd*, 407 F.2d 330, 337 (D.C. Cir. 1968); *B. F. Goodrich Co.* v. *Department of Transportation*, 541 F.2d 1178, 1181-1182 (6th Cir. 1976); *Boating Industry Association* v. *Boyd*, 409 F.2d 408, 411 (7th Cir. 1969); cf. *PACCAR, Inc.* v. *National Highway Traffic Safety Administration*, 573 F.2d 632, 636 (9th Cir.), cert. denied, 439 U.S. 862 (1978); *Associated*

This Court has stressed that the arbitrary and capricious standard of judicial review is "a narrow one" and that "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Agency rules subject to review under this standard may be set aside only "if they are not rational and based on consideration of the relevant factors." *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 803; see also *id.* at 805, 814; *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 413-416; *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974). NHTSA's rescission of the passive restraint requirement plainly was not arbitrary or capricious under these principles.

The agency's explanation of its reasons for rescission contained an extensive "consideration of the relevant factors" Congress specified in the Act itself as prerequisites for the imposition of a motor vehicle safety standard. ~~for the imposition of a motor vehicle safety standard. Th~~ The agency's consideration of these factors also plainly was "rational." The court of appeals itself sustained as reasonable the first two of the three factual determinations that led NHTSA to conclude that it could no longer find that the passive restraint requirement would meet the need for motor vehicle safety: (i) that most automobile manufacturers intended to comply with the Standard by installing detachable passive belts, and (ii) that such a belt, once detached, becomes identical to a manual belt (Pet. App. 50a, 96a, 98a). With respect to NHTSA's third finding, the court of appeals similarly conceded that "[t]here may well be 'substantial uncertainty' about the

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Industries of New York State, Inc. v. *United States Department of Labor*, 487 F.2d 342, 348 (2d Cir. 1973); but see *Chrysler Corp.* v. *Department of Transportation*, *supra*, 472 F.2d at 667-670. Under 5 U.S.C. 706(2)(B)-(D), rules promulgated following informal rulemaking procedures also may be set aside if they are contrary to the Constitution, in excess of statutory authority or short of statutory right, or without observance of procedure required by law. These bases of judicial review under the APA are not at issue here.

seatbelt usage rates that can be predicted if detachable belts are widely used" (*id.* at 51a). The court of appeals also did not question NHTSA's estimate that the costs of implementing Modified Standard 208 would exceed $1 billion annually (*id.* at 16a-17a, 105a) or NHTSA's interpretation of the Act as requiring that any potential safety benefit be weighed against these costs in determining whether the Standard satisfies the statutory requirements that a safety standard be "reasonable" and "practicable" (*id.* at 16a-17a, 88a, 93, 105a).[16]

Given the acknowledged uncertainty regarding whether any significant increase in usage rates of seatbelts could be expected under Modified Standard 208, it manifestly was reasonable for NHTSA to withdraw the passive restraint requirement before it took effect, rather than to impose its substantial costs and burdens on the motoring public and automobile manufacturers. There was thus a "'rational connection between the facts found and the choice made'" (*Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 285, quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)). Because the court of appeals sustained NHTSA's findings in the relevant respects, it should have sustained NHTSA's rescission of Modified Standard 208 as well.[17]

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[16] See also S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966); 112 Cong. Rec. 14245 (1966) (remarks of Sen. Lausche); *id.* at 19648 (remarks of Reps. Dingell & Staggers); *H & H Tire Co.* v. *United States Department of Transportation*, 471 F.2d 350, 353-354 (7th Cir. 1972); *id.* at 356-357 (Stevens, J., concurring).

[17] Because the court of appeals sustained NHTSA's findings in the relevant respects and because its holding rested on other grounds, we will not set forth here an extensive discussion of NHTSA's consideration of the statutory criteria and the rationality of its actions in light of those criteria. For present purposes, the validity of NHTSA's action has been sufficiently summarized here and in the Statement. See pages 7-12, *supra*.

The court of appeals nevertheless held that NHTSA's rescission of the passive restraint requirement was arbitrary and capricious. In doing so, it not only misapprehended the role of a reviewing court under the arbitrary and capricious standard; it fashioned in the process no less than three unprecedented and erroneous principles of administrative law.

I.

A. As an initial matter, the court of appeals misconceived the nature of the arbitrary and capricious standard of judicial review. That standard was intended to permit a reviewing court to set aside administrative action only where the agency has acted irrationally or exercised its power in such an unreasonable manner that it must be deemed to be unauthorized and therefore "not in accordance with law." 5 U.S.C. 706(2)(A).

B. Ignoring these limitations, the court of appeals held that in order for an agency to rescind a rule—even one that has yet to take effect—it is not sufficient that the agency has developed substantial uncertainty that the rule will in fact produce the benefits on which its initial promulgation was premised. The agency instead must affirmatively establish to the satisfaction of the reviewing court that the rule in fact will not produce such benefits before it may be revoked. In other words, evidentiary doubts that would have allowed, indeed perhaps required, an agency not to issue a regulation in the first instance are insufficient to permit that agency, on further reflection, to withdraw the regulation.

This unprecedented result disregards the explicit statutory limitations on judicial review contained in the Administrative Procedure Act. It cannot be arbitrary or capricious for an agency to conclude that there should be some firm indication that a regulation will serve a useful purpose before imposing its costs and burdens, especially those of the magnitude involved here, upon the public. The court of appeals' ruling also is inconsistent with the decisions of this Court recognizing that administrative

agencies must retain maximum flexibility to adapt their regulatory policies to changing circumstances.

C. It was equally erroneous for the court of appeals to hold NHTSA's action arbitrary and capricious because the agency did not, in the court's view, sufficiently consider certain alternative courses of action. NHTSA of course did thoroughly consider the alternatives set forth in the Notice of Proposed Rulemaking, as well as the possibility of requiring that all passive belts be nondetachable. But in addition, nothing in the Safety Act or the APA prohibited NHTSA from rescinding the particular passive restraint standard that previously had been promulgated before considering whether some other passive restraint requirement would satisfy the statutory criteria. Rescission was especially prudent in view of the acknowledged defects of Modified Standard 208 as it then read and its imminent effective date of September 1982, which would have required expensive compliance efforts by automobile manufacturers. The court of appeals' insistence that the alternatives it cited be considered in the rescission proceedings themselves, rather than at a later date, is inconsistent with the teaching of *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), that courts may not impose additional procedural requirements on administrative agencies.

D. The court of appeals also erred in its reliance upon what it termed the "legislative reaction" to the passive restraint issue. The court acknowledged that in none of the instances upon which it relied had Congress enacted positive law requiring NHTSA to promulgate a passive restraint standard, and that Congress had merely failed to prohibit NHTSA from doing so and had failed to exercise a legislative veto of Modified Standard 208 when it was promulgated in 1977. Such congressional inaction, and the debates surrounding it, did not abrogate NHTSA's preexisting statutory authority and responsibility to determine whether Modified Standard 208 satisfied the statutory requirements. In any event, the legislative

activities relating to NHTSA's consideration of passive restraints, far from indicating a firm endorsement, demonstrate an abiding congressional concern and indeed ambivalence regarding mandatory passive restraints.

II.

Even if the court of appeals were correct that NHTSA's rescission of the passive restraint requirement was arbitrary and capricious, the court should have remanded to the agency to afford it the opportunity to remedy the defects identified by the court and to permit the agency to consider an appropriate effective date.

ARGUMENT

I. THE RESCISSION OF THE PASSIVE RESTRAINT REQUIREMENT OF MODIFIED STANDARD 208 WAS NOT ARBITRARY AND CAPRICIOUS

A. The Arbitrary And Capricious Standard Of Judicial Review Reflects The Deference Congress Intended To Be Accorded Agency Policy Choices Within A Statutorily Prescribed Range And Is Consistent With The Legislative Nature Of Agency Rulemaking

1. The text and origins of Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706, make clear that the arbitrary and capricious standard of judicial review was not intended to permit a court to interfere with an agency's expert judgment as to how statutory policy should be implemented within the limits established by Congress. "'[T]he fact that [a court] might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter.'" *CBS, Inc.* v. *FCC*, 453 U.S. 367, 394 (1981), quoting *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). The arbitrary and capricious standard of review represents, rather, an outer limit on the exercise of administrative

discretion. It was intended for those rare situations in which the action in question may literally fall within the scope of the agency's power, but in which the power was exercised in a manner that so far departs from what must reasonably have been in the contemplation of Congress (or from the restraints on arbitrary governmental action imposed by the Due Process Clause of the Fifth Amendment) as to be, in substance if not in form, beyond the agency's authority.

This understanding of the applicable scope of judicial review is reflected in the language of 5 U.S.C. 706(2)(A), which provides that a reviewing court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The words "arbitrary," "capricious" and "abuse of discretion" are recited with such regularity in the domain of administrative law that their very familiarity may have come to mask their intended meaning. Given their ordinary meaning, however, these terms in fact connote a willful irrationality, randomness, whim, or impropriety in the exercise of congressionally delegated power.[18] Similarly, the use of the word "otherwise" in introducing the concluding phrase in 5 U.S.C. 706(2)(A) underscores that a court is authorized by that provision to set aside agency action challenged as arbitrary, capricious, or an abuse of discretion only in those situations in which it is of a type that must be deemed "not in accordance with law" and therefore not authorized by *Congress*. The reviewing court's own view that the agency action was unwise or erroneous is insufficient.

The legislative history of the APA confirms this interpretation of 5 U.S.C. 706 (2)(A). Section 10(e) of the APA, 5 U.S.C. 706, was not intended to establish broad new standards for judicial review of administrative

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[18] See *Webster's Third International Dictionary* (1976), at 8 ("abuse"), 110 ("arbitrary"), and 333 ("capricious").

action. Rather, the APA largely restated prevailing principles of judicial review.[19] As the Senate Judiciary Committee explained:

> It is not possible to specify all instances in which judicial review may operate. Subsection (e), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. Each category has been recognized (see *Final Report*, Attorney General's Committee, pp. 87 *et seq.* [20]). The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution (*Interstate Commerce Commission* v. *Illinois Cent. R. Co.*, 215 U.S. 452, 470 (1910); *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U.S. 541, 547 (1912)) and have also been carried into State practice, in part at least, as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the States, and the Fifth Amendment, applicable to the Federal Government (*New York & Queens Gas Co.* v. *McCall*, 245 U.S. 345, 348 (1917)). The fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administratve record may be made.

Senate Judiciary Committee Print (June 1945), as reproduced in *Legislative History, Adminstratve Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 39 (1946).

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[19] See S. Rep. No. 752, 79th Cong., 1st Sess. 38, 43-44 (1945); *Attorney General's Manual on the Administrative Procedure Act* 93, 108 (1947). This Court has given weight to the Attorney General's contemporaneous interpretation of the APA, since the Justice Department was heavily involved in the legislative process that resulted in its enactment. See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 546.

[20] *Administrative Procedure in Government Agencies, Report of the Committee on Administrative Procedure Appointed by the Attorney General*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) (hereinafter "*Final Report*").

This description of the judicial review provisions of the APA is especially instructive here for several reasons.

First, in *ICC* v. *Illinois Central R.R.*, 215 U.S. 452, 470 (1910), cited by the Committee, the Court stated:

> Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.

These three bases of judicial review find direct analogs in the first three subsections of 5 U.S.C. 706(2).

The first and second factors described by the Court in *Illinois Central R.R.* are reflected in 5 U.S.C. 706(2)(B) and (C), which authorize a reviewing court to set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." The third basis for setting aside agency action identified by the Court is, in turn, reflected in the arbitrary and capricious standard of review in 5 U.S.C. 706(2)(A). This direct parallel thus confirms that the arbitrary and capricious standard was intended to permit a reviewing court to set aside agency action only where power is exercised in such an unreasonable manner as to be, in effect, the equivalent of action that is outside of the scope of the authority delegated to the agency. The formulations employed by the Court in *ICC*

v. *Union Pacific R.R.*, 222 U.S. 541, 547 (1912), and *New York & Queens Gas Co.* v. *McCall*, 245 U.S. 345, 348 (1917), also cited by the Senate Committee, are similar.[21]

It also is instructive that in its explanation of Section 10(e) of the APA, the Senate Judiciary Committee compared the standards of review under the APA to the minimum standards thought to be necessary to satisfy the requirements of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. This suggests that where the validity of an agency rule is concerned, a reviewing court charged with the task of determining whether the rule is authorized by the governing statute performs a function akin to determining whether a statute is authorized by the Constitution. This analogy is, of course, reinforced by decisions of this Court recognizing that agency regulations of general applicability that have the force and effect of law are much like legislation and, indeed, are characterized as "legislative" rules. See, *e.g.*, *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979); *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977); see also *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 663 (1980)

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[21] In language presaging its later decisions under the APA, the Court stressed in *Illinois Central R.R.* that it could not, "under the guise of exerting judicial power, usurp merely administrative function by setting aside a lawful administrative order upon [the Court's] conception as to whether the administrative power has been wisely exercised." 215 U.S. at 470. Under the pre-APA cases, then, it was not sufficient for a court to set aside administrative action that it "shall appear to be unwise or burdensome or inferior to another," since "[e]rror or unwisdom is not equivalent to abuse." *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936); see also *id.* at 237 (regulations could be invalidated if they were "the expression of a whim rather than an exercise of judgment"); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186 (1935); and *Baltimore & Ohio R.R.* v. *Pitcairn Coal Co.*, 215 U.S. 481, 494 (1910), and *Kansas City Southern Ry.* v. *United States*, 231 U.S. 423, 443-444 (1913), cited in *New York & Queens Gas Co.* v. *McCall*, *supra*, 245 U.S. at 348.

(Burger, C.J., concurring).[22] In much the same way as a legislature, albeit within the narrower limits defined by Congress itself, administrative agencies are charged with the duty to assess relevant factual and policy considerations and to "weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 293.

Except where an Act of Congress contravenes a specific constitutional limitation, a court may strike down the statute only if it is not rationally related to a legitimate governmental purpose. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981); *Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981); *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981). This Court's formulation of the test for assessing the validity of agency regulations under the arbitrary and capricious test is quite similar: such rules may be set aside only "if they are not rational and based on a consideration of the relevant factors." *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 803.[23]

2. The foregoing discussion of the text and background of 5 U.S.C. 706(2)(A) demonstrates that NHTSA's action in this case was not arbitrary or capricious. Rescission of the passive restraint requirement plainly was within the limits prescribed by Congress, for the Safety Act expressly authorizes the Secretary to "amend or revoke any Federal motor vehicle safety standard" (15 U.S.C. 1392(e)). Nor is there anything to suggest that

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[22] The *Final Report* of the Attorney General's Committee on Administrative Procedure states (at 27), for example, that "substantive regulations have many of the attributes of statutes themselves and are well described as subordinate legislation." See also S. Rep. No. 752, 79th Cong., 1st Sess. 39 (1945).

[23] The *Final Report* of the Attorney General's Committee on Administrative Procedure proposed a similar standard (at 117): whether there is "a rational relationship between a regulation and the governing statute."

NHTSA exercised its conceded power in such an unreasonable manner that it must be deemed "not in accordance with law" and hence, in substance, outside of the limits of authority conferred by Congress. To the contrary, the agency's exercise of its power under 15 U.S.C. 1392(e) was strictly "in accordance with law": the decision to rescind was based on the agency's conclusion that it could not affirmatively find that the criteria set forth in the law itself were satisfied, in view of the substantial uncertainty, acknowledged by the court below, that any significant safety benefits would accrue. A decision so directly related to the statutory criteria, taken pursuant to an express grant of authority to amend or revoke a safety standard, cannot be thought to have so far departed from what may reasonably have been within the contemplation of Congress as to be deemed unauthorized.

The parallel between the statutory arbitrary and capricious standard and constitutional restraints further reinforces this conclusion. Applying the usual constitutional test, NHTSA's order rescinding the passive restraint requirement plainly is rationally related to the purposes and limitations of the Safety Act. But in addition, it is significant that absent invidious purpose or classification, the Constitution imposes no restrictions on the authority of a legislature to repeal a statute—even though a rational basis would have been necessary to support enactment of the statute. *Crawford* v. *Board of Education of Los Angeles*, No. 81-38 (June 30, 1982), slip op. 7, 10-11; *Hunter* v. *Erickson*, 393 U.S. 385, 390 n.5 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369, 375 (1967).[24] This suggests that a court must be extremely reluctant under the APA to set aside an agency's decision to rescind a regulation that was not required by its authorizing statute, irrespective of whatever standard of reasonable-

[24] The Constitution likewise affords an administrative body broad latitude to rescind prior action. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531 n.5 (1979); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 414 (1977).

ness is applicable to the promulgation of the regulation. A rule of administrative law that tends to "lock in" an agency so that action taken cannot be undone, like a constitutional rule to the same effect, would in the long run deter valuable experimentation. *Crawford* v. *Board of Education of Los Angeles, supra*, slip op. 7, 10-11 & n.22; *Palmer* v. *Thompson*, 403 U.S. 217, 228 (1971) (Burger, C.J., concurring).

B. The Court Of Appeals Erred In Concluding That It Was Arbitrary And Capricious For NHTSA To Rescind The Passive Restraint Requirement On The Basis Of Substantial Uncertainty That It Would Produce Significant Safety Benefits

Despite NHTSA's thorough and reasoned assessment of Modified Standard 208 in light of the relevant statutory criteria, the court of appeals held that NHTSA acted arbitrarily and capriciously in rescinding the passive restraint requirement. In the court's view, it was not sufficient, in order for NHTSA to rescind the requirement, that there was "substantial uncertainty" whether usage rates would increase with the installation of detachable passive belts and therefore whether the requirement would actually produce significant safety benefits. Rather, the court held, NHTSA must affirmatively demonstrate to the satisfaction of the reviewing court that Modified Standard 208 will *not* produce the benefits on which its promulgation in 1977 was premised before it may amend the Standard (Pet. App. 51a). This unprecedented holding is flatly inconsistent with the limited role of a reviewing court under the arbitrary and capricious standard.

The court pointed to nothing in the language or legislative history of either the APA or the Safety Act to support its holding. Nor did it cite any judicial precedent. The best the court could do was to state the point in reverse: it would be unreasonable, the court explained, for an agency to promulgate a regulation in the first

instance simply because of "substantial uncertainty" that the status quo—*i.e.*, the absence of a regulation—was any better (Pet. App. 51a). Conversely, the court apparently believed, an agency cannot alter the status quo by rescinding a regulation on the basis of "substantial uncertainty" that the regulation will accomplish its intended purpose in an efficient manner. This reasoning is both illogical and contrary to the text and structure of the Safety Act.

The court of appeals is quite correct that the Secretary would be justified in declining to promulgate a safety standard in the first instance if he were uncertain that the standard would be better than no standard at all, because in that event the Secretary might well be unable to make an affirmative finding that the proposal satisfied the statutory requirements that a standard be appropriate, reasonable, practicable, and meet the need for motor vehicle safety. But the court of appeals drew the wrong conclusion from its initial premise. It is precisely because the Secretary reasonably may decline to *issue* a safety standard in the first instance if he has substantial doubts about its efficacy that the Secretary also may decline to *retain* such a standard if he has developed similar doubts. For in the latter situation, no less than the former, the Secretary may be unable to make the affirmative finding that the standard satisfies the statutory criteria for a safety standard to be in effect.[25]

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[25] The court of appeals itself appeared to recognize this point, conceding that "[i]mplicitly, the perpetuation of a regulation also involves a decision that its continuation is worthwhile, and reasonable decisionmaking requires that this too be supported by reasons" (Pet. App. 54a). The court stated that if NHTSA was uncertain that usage rates would increase under the Standard as written, it reasonably could have suspended the Standard (*ibid.*). The court failed to explain why, if the agency would be free to suspend the Standard (presumably for as long as the uncertainty persisted), the agency was not free to rescind it. Whether the Standard were suspended or rescinded, the agency would be free to reinstate the Standard at a later date if evidence indicated that it would fulfill the statutory purposes.

Nor is the court of appeals' holding defensible on the theory that an agency is required to make an affirmative showing whenever it departs from the status quo, whether the movement is from the absence to the existence of a regulation on a particular subject, or the reverse. The pertinent inquiry is not whether the agency has altered the status quo or maintained it, but rather what limits the governing statute places on the agency action in question. In this case, although the Safety Act requires the Secretary to make an affirmative finding that a standard satisfies the statutory criteria before he may place the standard into effect, the Act requires no affirmative finding that the statutory criteria will not be satisfied for there to be an *absence* of a safety standard in a particular area. The court of appeals therefore was without authority to insist that NHTSA affirmatively establish to the court's satisfaction that the passive restraint requirement would not produce the requisite safety benefits before it could rescind that requirement.[26]

As the court of appeals recognized, then, "rescission more resembles agency refusal to act than an agency decision to act" (Pet. App. 25a), because the effect of rescission is that the agency has refused to supply a regulation on the subject in question. And as the court of appeals further acknowledged, "it is only in the rarest and most compelling circumstances that courts overturn an agency's '"expert" determination not to pursue a particular program or policy at a given time'" (*ibid.*, citing *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818-819 (D.C. Cir. 1981), and *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979)); see also S. Rep. No. 752, *supra*, at 44. No such compelling circumstances are present here. The responsibility of the court below was limited to

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[26] The Safety Act essentially embodies a congressional presumption *against* regulation, which may only be overcome in specifically defined circumstances. The court of appeals' opinion, in contrast, embodies the opposite presumption in any area in which a safety standard has been promulgated.

determining whether NHTSA rationally could have believed in the circumstances presented that sufficient uncertainty existed to counsel rescission of the rule. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 416. Once the court of appeals concluded that NHTSA was reasonable in its assessment of the uncertainty regarding usage rates (Pet. App. 51a), its role in reviewing NHTSA's action was at an end.[27]

Agency action is not rendered invalid because the record does not contain firm proof that the eventualities on

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[27] The court of appeals stated that if NHTSA believed that passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, "then only a well justified refusal to seek more evidence could render rescission non-arbitrary" (Pet. App. 53a). The only authority the court cited for this proposition was its own prior decision in *National Association of Demolition Contractors* v. *Costle*, 565 F.2d 748, 751-752 (1977). But the court there *sustained* EPA's decision not to conduct the test in question. In any event, that case involved a challenge to EPA's failure to conduct a test before *adopting* a regulation, and it therefore presented the question whether further evidence was necessary to sustain an agency's action imposing a regulatory burden. That decision does not support the imposition of a requirement that an agency obtain additional evidence before rescinding a regulation.

Even if the court of appeals were correct that generation of further data on usage rates might be desirable, it clearly exceeded its authority in requiring that Modified Standard 208 remain in effect until those data were obtained. The question whether manufacturers and consumers should be required to devote their scarce resources to compliance with the Standard pending further study is a matter uniquely within the competence and discretion of the expert agency to which Congress has entrusted these difficult issues of statutory policy. Cf. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, *supra*, 423 U.S. at 329-331. Moreover, 15 U.S.C. 1392(f)(1) provides that in prescribing standards, the Secretary shall "consider relevant *available* motor vehicle safety data" (emphasis added). This language suggests that a safety standard should not be in effect if the data thought necessary to support it are not available. If this Court sustains the rescission of the passive restraint requirement, NHTSA will of course remain free to reinstate such a requirement in the future if further experience or studies show that it would satisfy the statutory criteria.

which the action is premised will actually occur, where the agency's determinations are primarily of a judgmental or predictive nature. "In such circumstances complete factual support in the record for the [agency's] judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 814, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961). See also *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594-595 (1981). It likewise is not "possible or required" in this case that NHTSA point to concrete data on the probable use of detachable passive belts under a safety standard that has not yet gone into effect. Especially where, as here, an agency seeks merely to withdraw a burdensome rule that was premised on a prior forecast of benefits that has since been found to be of doubtful validity, rather than to impose new burdens in the face of uncertain conditions, the agency cannot be precluded from acting because it has been unable to go further and develop evidence to prove that the forecast was actually wrong. Cf. *NAACP* v. *FCC*, 682 F.2d 993, 1000-1001 (D.C. Cir. 1982).

Moreover, this Court has stressed that an administrative agency must remain free to reassess its regulatory policies and adapt them to changing circumstances. *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 811; *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); *American Trucking Associations, Inc.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967). An agency "should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *FCC* v. *WNCN Listeners Guild*, *supra*, 450 U.S. at 603, citing *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943). See *Chrysler Corp.* v. *Department of Transportation*, *supra*, 472 F.2d at 673; *PACCAR, Inc.* v.

National Highway Traffic Safety Administration, 573 F.2d 632, 642 (9th Cir.), cert. denied, 439 U.S. 862 (1978). The decision of the court of appeals conflicts with these principles of administrative discretion and flexibility by erecting a judicial barrier to the revision of regulatory policy, in the form of a requirement that the agency first convince the reviewing court that any previously promulgated rule will not serve the statutory purposes. The long term effect under this and like statutes [28] may be not only to freeze existing regulations that have become outmoded, but to chill experimentation in the future for fear that what is done cannot later be readily undone if it proves unwise or ineffective. Cf. *Crawford* v. *Board of Education of Los Angeles*, *supra*, slip op. 7, 10-11 & n.22.

To be sure, where an agency changes from a "settled course," it may have some duty to explain that change. *Atchison, T & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-808 (1973). But this procedural requirement does not alter an agency's *substantive* authority to "flatly repudiate [prior] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy." *Id.* at 808. Here, as explained above (see pages 7-11, *supra*), NHTSA fully explained its decision to rescind the passive restraint requirement in light of such changed circumstances.

In any event, there hardly has been a "settled course" by NHTSA over the years regarding the *mandating* of passive restraints. Although NHTSA has considered the issue of automatic restraints since 1969, no requirement that such devices be installed has ever gone into effect. With the exception of the periods from 1970 to 1972 and from 1977 to 1981, when a mandatory passive restraint requirement was in place for the *future*, the issue has at most only been under consideration by the agency or, as

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[28] See, *e.g.*, 15 U.S.C. 77sss(a); 15 U.S.C. (Supp. V) 1193(j); 15 U.S.C. (Supp. V) 2056(a); 21 U.S.C. 360d(a)(2)(A); 30 U.S.C. (Supp. V) 811(a).

in the period following Secretary Coleman's decision and now, subject to an affirmative judgment that automatic restraints should not be mandated under prevailing conditions. See pages 3-8, *supra*.[29] Indeed, Secretary Adams' promulgation of Modified Standard 208 was itself a sharp break with Secretary Coleman's decision just four months earlier, and that break occurred in the absence of an intervening change of circumstances of the kind that warranted reexamination of the rule in 1981.

C. The Decision To Rescind The Passive Restraint Requirement In Modified Standard 208 Was Not Rendered Arbitrary And Capricious Simply Because The Agency Did Not First Consider Whether Some Other Version Of A Passive Restraint Requirement Would Satisfy The Statutory Criteria

The court of appeals also held that, even if NHTSA had correctly concluded that Modified Standard 208 is "unjustified as written" (Pet. App. 49a), its rescission of the passive restraint requirement of Modified Standard 208 was arbitrary and capricious because the agency "artificially foreclosed attempts to further the purpose of the Safety Act" by not considering certain other alternative courses of action (*ibid.*; see *id.* at 54a-66a). This holding is clearly wrong, because NHTSA's rescission of one particular version of a passive restraint requirement in no way foreclosed the consideration of other options.

As an initial matter, the court of appeals itself acknowledged that the agency adequately considered the three alternatives to rescission that were set forth in the April 9, 1981 Notice of Proposed Rulemaking: reversing the sequence of compliance; requiring simultaneous compliance; and amending the Standard to exempt the front

[29] Nor has NHTSA abandoned its support of passive restraints. Such restraints remain one means of compliance with Modified Standard 208 (49 C.F.R. 571.208/S4.1.2.1), and NHTSA could reinstate a mandatory passive restraint requirement at some point in the future if further developments warrant. See also note 27, *supra*.

center seating position. The court found NHTSA's analysis of these alternatives to be "impressively thorough and careful" (Pet. App. 55a & n.32). But the court concluded that NHTSA also should have considered whether to amend the passive restraint requirement to permit compliance by airbags or by belts only if they are nondetachable.

Moreover, NHTSA in fact did consider whether it should mandate some kind of use-compelling device, such as continuous belts. NHTSA concluded that it should not, based on past congressional reaction to use-compelling devices, public fears about being trapped, and the possible complications of extrication after an accident (Pet. App. 109a-112a). These reasons, tied directly to the statutory criteria of practicability and the need for safety, fully supported rejection of this alternative. In addition, the court acknowledged that the cost of airbags ranged from $200 to $1000 per unit, depending upon economies of scale, and that NHTSA had considered those costs in its regulatory impact analysis (*id.* at 65a-66a; see C.A. App. 172).

In any event, the court's insistence that NHTSA consider the airbag and continuous belt alternatives as a condition precedent to rescission of the passive restraint requirement of Modified Standard 208 represents another wholly unwarranted judicial intrusion into the administrative process. The principal and pressing issue before the agency was whether the particular version of a passive restraint standard that had already been promulgated and was scheduled to go into effect in the near future could be found to satisfy the statutory criteria for a motor vehicle safety standard, not whether some other version of a passive restraint standard that had not yet even been proposed for public comment would satisfy those criteria. Once NHTSA determined that it was incapable of funding that the passive restraint requirement as written met the statutory cirteria, it manifestly was reasonable for the agency to move expeditiously to

withdraw that requirement. Otherwise, manufacturers would have had to devote their scarce resources to complying with a safety initiative that posed a considerable risk of being ineffective or even counterproductive.

It is significant in this regard that ever since the Department of Transportation issued its original Standard 208 in 1967, even minor adjustments to the Standard have been identified in notices of proposed rulemaking before adoption. The two alternatives the court identified in this case, however, would have required a major revision of Modified Standard 208 and would have imposed substantial burdens on manufacturers and the public. In these circumstances, had NHTSA actually adopted one of the alternatives suggested by the court, it might have faced challenges from the manufacturers and others on the ground that its notice of proposed rulemaking did not give adequate warning that such a rule might be adopted. See, *e.g.*, *Kollett* v. *Harris*, 619 F.2d 134, 144 (1st Cir. 1980); *Rodway* v. *United States Department of Agriculture*, 514 F.2d 809, 814-815 (D.C. Cir. 1975); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972); see also *Eli Lilly & Co.* v. *Costle*, 444 U.S. 1096, 1097-1098 (1980) (Rehnquist and Powell, JJ., dissenting from the denial of certiorari).

The prospect of procedural challenges to one side, principles of fairness, sound administration, and feasibility almost certainly would have required NHTSA to publish yet another notice of proposed rulemaking specifically addressing the continuous belt and airbag options, and this step would have been taken only after NHTSA had first developed proposed technical performance criteria calculated to satisfy the statutory requirement that a safety standard be stated in objective terms. Rulemaking proceedings of such a complex and controversial nature might well have taken some time for the agency to complete. There is no reason in law, policy, or common sense why NHTSA was required to retain on the books the one passive restraint requirement that it already had evalu-

ated and found wanting while it searched for some other standard that satisfied the statutory requirements. Only the court of appeals' apparent presumption in favor of a passive restraint standard in *some* form can explain its insistence that some version of such a standard remain on the books until mandatory passive restraints were affirmatively shown to be unworkable in all respects.

Moreover, contrary to the court of appeals' observation, NHTSA's rescission of a passive restraint requirement that was expected to be satisfied by installation of detachable belts did not "foreclose" NHTSA from considering in the future other forms of a passive restraint standard or other options for improving occupant protection (Pet. App. 49a). The agency remains free to conduct research and collect data about these alternatives and to consider them more formally in a new rulemaking proceeding initiated by NHTSA itself or requested in a rulemaking petition filed by an interested party pursuant to 5 U.S.C. 553(e). But nothing in the APA or the Safety Act required that other possible courses of action be considered in the rescission proceeding rather than in an independent proceeding focusing more directly on the alternatives. This Court has only recently reiterated the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure" (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 544), thereby leaving them free " 'to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties' " (*id.* at 543, quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), and *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). The court of appeals' imposition of its own preferred order of proceeding is inconsistent with this admonition.

It is instructive in this regard that when Congress intends that an agency consider alternative courses of action before reaching a particular decision, it has expressly so provided. For example, the highway statutes involved in *Citizens to Preserve Overton Park* v. *Volpe*

explicitly required the Secretary to consider whether there was a "feasible and prudent alternative" to locating a highway in parkland. 401 U.S. at 411. Similarly, the National Environmental Policy Act, which was the basis of the Court's discussion of the consideration of alternatives in *Vermont Yankee* (435 U.S. at 549-555), explicitly requires that all federal agencies include in every report of major federal action significantly affecting the quality of the human environment "a detailed statement by the responsible official on * * * alternatives to the proposed action." 42 U.S.C. 4332(C)(iii). In *Pillai* v. *CAB*, 485 F.2d 1018, 1029 (D.C. Cir. 1973), cited by the court of appeals (Pet. App. 49a), Congress had enacted a statute for the purpose of conferring a regulatory option on the CAB to be employed in the context of international negotiations such as those at issue in that case, yet the CAB had failed to address that alternative. 485 F.2d at 1027-1029. And in *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), also cited by the court below (Pet. App. 56a), the FPC had conceded that under the applicable statute, 16 U.S.C. 803(a), it was required to consider alternatives to licensing that might better protect recreational values. 354 F.2d at 614, 617.

The Safety Act, on the other hand, contains no comparable requirement that alternatives be considered. Nor does the APA. Indeed, in contrast to the detailed consideration of environmental factors required under NEPA, the informal rulemaking provisions of the APA require only the publication of a notice of proposed rulemaking, an opportunity for comment, and the incorporation in the rules adopted of "a concise general statement of their basis and purpose." 5 U.S.C. 553(c). There is no explicit requirement to discuss or consider other possible rules that were not ultimately adopted.[30] Given Congress'

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[30] Compare 5 U.S.C. 557(c)(A), which requires a statement of "findings and conclusions, and the reasons or basis therefor, on all

mandate in one statute of government-wide application—NEPA—that alternatives be considered, courts should be reluctant to read such a requirement into another statute of government-wide application—the APA—that does not expressly so provide.

It is significant, moreover, that *Overton Park*, *Vermont Yankee*, *Pillai*, and *Scenic Hudson* all involved the consideration of alternatives before the agency took action. Even if we assume that the Safety Act and the APA might likewise require NHTSA, before *adopting* a motor vehicle safety standard, to address alternative standards or other courses suggested by interested parties or by NHTSA itself—in order to provide some assurance that the standard ultimately selected is sufficiently "appropriate," "practicable" and "reasonable" and will "meet the need for motor vehicle safety" when compared to others—NHTSA would have no such obligation before *rescinding* a safety standard. There is no requirement that the quoted statutory criteria be satisfied for there to be an absence of a safety standard, and there accordingly is no basis for requiring consideration of alternative means by which the statutory criteria might be met.[31]

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the material issues of fact, law, or discretion presented on the record."

[31] The court of appeals also suggested (Pet. App. 57a-58a) that NHTSA's doubts about the effectiveness of detachable automatic belts in increasing belt usage over the rates experienced for manual belts means that detachable automatic belts might not be "passive restraints" at all. In the court's view, it would be irrational for NHTSA to rescind the passive restraint requirement based on industry plans to install detachable belts that do not even comply with the Standard. This reasoning is erroneous.

It always has been understood that detachable automatic belts comply with Standard 208. Indeed, until 1978, if belts rather than airbags were to be installed to comply with the Standard, such belts were *required* to be detachable by means of a latch mechanism, in order to permit emergency exit. See note 8, *supra*. When attached, a detachable belt provides complete passive protection, be-

D. The Court Of Appeals Erred In Concluding That "Legislative Reaction" To The Passive Restraint Issue, Short Of The Enactment Of Positive Law, Narrowed The Scope Of NHTSA's Discretion To Rescind The Passive Restraint Requirement

Underlying the court of appeals' other holdings, discussed in Parts B and C, *supra*, was its view that NHTSA's discretion under the Safety Act to amend or revoke the mandatory passive restraint provisions of Modified Standard 208 had been restricted by various episodes of "legislative reaction" to the passive restraint issue. The court's reading of the legislative record as reflecting a firm and consistent congressional commitment to mandatory passive restraints is erroneous. But aside from this misreading of the legislative materials, the court's unprecedented suggestion that congressional inaction and the consideration of bills never enacted can somehow narrow an agency's discretion under previously enacted law is inconsistent with the explicit constitutional

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cause no action by the occupant is necessary for the belt to be placed in position around him when the door is closed. That members of the public might use the emergency latch mechanism to detach the belt permanently, as NHTSA predicted, does not undermine the belts' passive nature. The court of appeals' suggestion that such belts do not satisfy Standard 208 therefore is wholly unfounded.

In any event, the court of appeals' speculation about the "passive" nature of detachable belts is a bootstrap. The issue before the court of appeals was not whether a detachable belt satisfies the "passive restraint" requirements of the *Standard*, because NHTSA, in the very action under review here, has rescinded that requirement. A standard expressed in "passive restraint" terms is not compelled by the Act, and the appropriateness of NHTSA's action therefore is not to be measured in those terms. The court instead was required to review NHTSA's decision under the explicit *statutory* criteria of practicability, reasonableness, and the need for safety, on which NHTSA had relied, irrespective of the court's own view of whether detachable belts are "active" or "passive" restraints as a theoretical matter.

prerequisites for according legally binding effect to the actions of Congress.

1. a. The first episode upon which the court of appeals relied was Congress' enactment in 1974 of the prohibition against an ignition interlock standard and of the provision for a legislative veto of any standard requiring or permitting compliance by means of airbags. Pet. App. 33a-36a; see 15 U.S.C. 1410b. As the court of appeals acknowledged (*id.* at 34a), these amendments had their origins in a floor amendment, adopted by the House by an overwhelming vote of 339-49 (120 Cong. Rec. 27822-27823 (1974)), that would have barred NHTSA from requiring ignition interlocks *or* passive restraints (*id.* at 27815). The debates were replete with objections that the interlock standard then in effect interfered with the occupant's freedom of choice and would impose excessive costs (*id.* at 11789, 11969, 16326, 18221, 27815-27822).[32]

The Conference Committee proposed and Congress enacted the compromise embodied in 15 U.S.C. 1410b, which bars ignition interlocks and provides for a legislative veto of any future imposition of a nonbelt passive restraint standard. The Conference Committee substitute reflected the fact that a standard mandating passive restraints had not yet been adopted by NHTSA following the Sixth Circuit's decisions in *Chrysler Corp.* and *Ford Motor* (see pages 4-5, *supra*) and that the Members "[did] not know what lies ahead in the field of passive restraints" in view of questions about the adaptability of airbags to smaller cars, indications that the utility of airbags is limited primarily to head-on collisions, and uncertainty about the cost of airbags. 120 Cong. Rec.

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[32] For the same reasons, the Senate also had gone on record, by passing an amendment to a pending highway aid bill by a vote of 64-21, as opposing the ignition interlock requirement and favoring congressional review of any mandatory passive restraint standard. 120 Cong. Rec. 30558, 30836-30850 (1974).

35637 (1974) (remarks of Rep. Wyman); see also *id.* at 27819-27820, 30849 (letters from Department of Transportation stating that no final decision had yet been made with respect to mandating passive restraints). Congress' restricting of NHTSA's freedom even to *adopt* occupant restraint standards in these circumstances scarcely can be viewed as an endorsement of passive restraints, much less as an expression of intent to restrict NHTSA's freedom to *rescind* whatever passive restraint standard might be adopted in the future because of doubts about its effectiveness.

b. The second "legislative reaction" upon which the court of appeals relied was Congress' failure to exercise a legislative veto of Modified Standard 208 when it was promulgated in 1977. Pet. App. 36a-37a. The court of appeals noted that the Senate voted 65-31 to table a resolution of disapproval, following a debate during which a number of Senators spoke favorably about the Standard, and that the responsible House Committee voted to table a resolution of disapproval. From this, the court leaves the misleading impression of pervasive congressional approval of Secretary Adams' decision. *Ibid.*; 123 Cong. Rec. 33318-33332 (1977). What the court fails to note, however, is the substantial hostility to the Standard in the House of Representatives. The resolution of disapproval had 160 sponsors in the House, and it was tabled in committee by the narrow vote of 16-14. 124 Cong. Rec. 17186 (1978) (remarks of Rep. Shuster); *id.* at 17189 (remarks of Rep. Broomfield).

Indeed, because the full House was deprived of an opportunity to vote on the passive restraint issue in 1977, Representative Shuster offered a floor amendment in 1978 to NHTSA's Fiscal Year 1979 appropriations bill barring the use of funds to implement or enforce any standard that required any motor vehicle to be equipped with an occupant restraint system other than a belt system. Although the Members recognized that the amendment to

the appropriations bill would have limited practical importance because Modified Standard 208 was not scheduled to go into effect until well after the end of Fiscal Year 1979, the rider was touted as the "only vehicle left for Members to express themselves" on the passive restraint issue (124 Cong. Rec. 17186 (1978) (remarks of Rep. Shuster); see also *id.* at 17189 (remarks of Rep. Daniel); *id.* at 17191 (remarks of Rep. Devine); *id.* at 17194 (remarks of Rep. Dingell); *id.* at 17197 (remarks of Rep. Broyhill)). The amendment was adopted by a vote of 237-143 (*id.* at 17199), following an extensive debate during which the Standard was attacked on the grounds that it would be expensive and ineffective and would constitute an irritating and unwarranted expansion of the regulatory role of government at the expense of personal freedom in the same manner as the interlock requirement overturned in 1974. *Id.* at 17186-17199.

Thus, the expression of sentiment by the House of Representatives that was most contemporaneous to the promulgation of Modified Standard 208 was strongly *against* implementation of the passive restraint requirement. The rider was enacted into law, Pub. L. No. 95-335, Section 317, 92 Stat. 450, and it was reenacted in the appropriations act for Fiscal Year 1980, Pub. L. No. 96-131, Section 317, 93 Stat. 1039, following similar debate in the House of Representatives. 125 Cong. Rec. H8055, H8066 (daily ed. Sept. 18, 1979).

c. The final episode upon which the court of appeals relied was Congress' consideration in 1979 and 1980 of proposals, never enacted into law, that would have either overturned or amended Modified Standard 208. Pet. App. 38a-46a. As before, the congressional reaction began with an overwhelming vote of the House of Representatives against mandatory passive restraints—this time, a vote of 320 to 73 in favor of an amendment to a pending authorization bill to bar NHTSA from spending funds to

administer an occupant restraint standard unless the standard permitted the purchaser of the vehicle to select manual rather than passive restraints. 125 Cong. Rec. 12285-12287 (1979).

The Conference Committee reported a substitute measure that would have required NHTSA to amend Standard 208 to postpone the initial compliance date by one year, to reverse the compliance schedule, and to mandate that each of the five largest manufacturers make airbags available in one vehicle line for three years. H.R. Conf. Rep. No. 1371, 96th Cong., 2d Sess. 15-17 (1980). If the Conference Committee's proposal had been enacted into law, it presumably would have constituted a ratification of Modified Standard 208 to the extent that Congress did not order amendment of the Standard.[33] But the proposal was not enacted. It passed the Senate, 126 Cong. Rec. S13506 (daily ed. Sept. 25, 1980), but failed in the House because it did not garner the votes necessary to be passed under a suspension or waiver of the House Rules that barred House conferees from agreeing to new matter. 126 Cong. Rec. H10194-H10198 (daily ed. Oct. 1, 1980), 126 Cong. Rec. H11912-H11918 (daily ed. Dec. 4, 1980).[34]

2. The court of appeals plainly erred in viewing this history as reflecting a congressional commitment to man-

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[33] Even that ratification of the Standard as promulgated in 1977 presumably would not have barred NHTSA from amending the Standard in light of changed circumstances, as it did here. See 126 Cong. Rec. H12120 (daily ed. Dec. 5, 1980) (remarks of Rep. Dingell).

[34] It is ironic that the court of appeals should rely on the 1980 Conference Committee proposal, since that proposal undermines the court's conclusion that NHTSA's action was arbitrary and capricious because it did not first consider the alternatives of requiring automatic belts to be nondetachable and mandating the installation of airbags in all vehicles. The Conference Committee proposal would have required that all automatic belts be *detachable* and that airbags be offered as an *option* only by the five largest manufacturers and only in one line, rather than mandating that they be installed in all vehicles.

datory passive restraints. To the contrary, it reflects at most an ambivalence and political sensitivity on the subject that underscores the impropriety of the court of appeals' substitution of its judgment for that of the expert agency Congress has charged with administering the Safety Act.

However, even assuming that the court of appeals were correct that sentiment in Congress at one time or another has favored passive restraints, the court's reliance on the episodes described above nevertheless was misplaced. Congress has never enacted a *law* mandating the promulgation of a passive restraint standard, as it has, for example, in mandating certain school bus standards. See 15 U.S.C. 1392(i). The court's opinion instead gives legally binding effect to congressional debates, resolutions, and failures to act that fall short of duly enacted law, concluding that such "legislative reaction" requires a more demanding standard of judicial review and has thereby effectively withdrawn a large measure of the discretion NHTSA was accorded under the Safety Act to amend or revoke the passive restraint requirement. This result violates the bicameralism and presentation requirements of Article I, Sections 1, 7, and 8 of the Constitution and conflicts with the doctrine of separation of powers. See Brief for the Immigration and Naturalization Service at 17-40, 44-56, *INS* v. *Chadha* (Nos. 80-1832, 80-2170 and 80-2171, 1981 Term).

This is not a case, like *Udall* v. *Tallman*, 380 U.S. 1, 17-18 (1965), upon which the court of appeals relied (Pet. App. 47a), in which legislative acquiescence in an administrative interpretation of a statute may be cited as evidence of the correctness of that interpretation. NHTSA has not disputed that the Safety Act may be interpreted to authorize the promulgation of a passive restraint standard—*if* NHTSA determines that such a standard satisfies the criteria set forth in the Safety Act. Here, the court of appeals relied upon the legisla-

tive activity not as a guide to the meaning of the Safety Act as originally enacted, but rather as effectively circumscribing the power conferred on NHTSA by that Act to determine whether to issue a motor vehicle safety standard and whether the proposed standard satisfies the statutory criteria.

II. EVEN IF NHTSA'S RESCISSION OF THE PASSIVE RESTRAINT REQUIREMENT WERE INVALID, THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY SETTING AN EFFECTIVE DATE FOR THAT REQUIREMENT PENDING FURTHER PROCEEDINGS

Although the court of appeals, in its June 1, 1982 opinion, set aside NHTSA's rescission of the passive restraint requirement, the court expressly denied the request by respondents State Farm and NAII that Modified Standard 208 take full effect on September 1, 1982 or 1983 (Pet. App. 72a). The court explained that its opinion did not foreclose rescission or suspension of the Standard after further administrative proceedings and that automobile manufacturers "would justifiably feel uncertain" about the technology that would satisfy the Standard because of the possibility that it would be revised after those proceedings (*ibid.*). The court therefore ordered a "remand" to NHTSA with directions to submit to the court within 30 days a schedule for resolving the questions raised by the court's opinion, leading either to a rescission or suspension of the Standard or to a judicially approved schedule for the effective implementation of that or an amended standard (*id.* at 72a, 74a, 161a).

In its August 4, 1982 memorandum, the court of appeals found that NHTSA's proposal for further proceedings to resolve the questions raised by the June 1 opinion was consistent with the court's directions (Pet. App.

82a). Nevertheless, in a reversal of its previous refusal to set an effective date, the court on August 4 ordered that Modified Standard 208 go into effect as written on September 1, 1983 unless NHTSA demonstrated to the court's satisfaction by October 1, 1982 that this effective date was not "achievable" (*id.* at 80a).[35] This action constituted a wholly unwarranted interference with the administrative process.

Given the acknowledged possibility that NHTSA might validly rescind the passive restraint requirement, it was inappropriate for this reason alone for the court of appeals to order compliance with the Standard by a date certain. Moreover, even if it is assumed that a passive restraint requirement ultimately would be retained in Standard 208 in some form, the court itself recognized that that requirement might be revised in a number of significant respects—*e.g.*, to prohibit the use of detachable belts, to require installation of airbags, or to delete the requirement for automatic restraints in the front center seating position (Pet. App. 55a & n.32, 72a). It thus was improper for the court to order compliance with the particular version of a passive restraint requirement that was embodied in Modified Standard 208. This is especially so in view of the inability of the agency charged with administering the Safety Act to find that the Standard with which the manufacturers would be forced to comply even satisfies the statutory criteria of reasonableness and practicability or meets the need for safety.

In addition, the court of appeals' August 4 order impermissibly usurped to that court authority that Congress has conferred on the Secretary. Under 15 U.S.C. 1392(c) and (e), an order establishing, amending or revoking a safety standard shall take effect no later

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[35] The court of appeals has not taken action following NHTSA's filing of October 1, 1982. See pages 15-16, *supra*.

than one year from the date of the order "unless the *Secretary* finds, for good cause shown, that [a] * * * later effective date is in the public interest, and publishes his reasons for such finding" (emphasis added). It therefore was for the Secretary, not the court, to determine in the first instance whether and when Modified Standard 208 should go into effect in its present form, taking into account further proceedings on remand. Cf. *Burlington Northern, Inc.* v. *United States*, No. 81-1008 (Dec. 13, 1982). This determination then would be subject to judicial scrutiny under the arbitrary and capricious standard of review in the same manner as any other amendment to a safety standard. Thus, once the court of appeals identified errors in NHTSA's decision, the court was barred from further "dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 544-545, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). The court instead should have remanded for further proceedings on the effective date issue.

The immediate practical significance of the August 4 order was diminished by the court of appeals' recall of its mandate on November 18, 1982, which had the effect of reinstating NHTSA's rescission of the mandatory passive restraint standard pending review by this Court. However, if this Court were to affirm the court of appeals' holding that NHTSA had not validly rescinded the passive restraint requirement, the effective date issue might be raised again in the court of appeals. For this reason, if the Court affirms the court of appeals' June 1, 1982 judgment and order, it should remand to the court of appeals with instructions to remand the case to NHTSA for further proceedings on the effective date issue as well as on the merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT E. KOPP
MICHAEL F. HERTZ
Attorneys

FRANK BERNDT
Chief Counsel

STEPHEN P. WOOD
DAVID W. ALLEN
Assistant Chief Counsels

ENID RUBENSTEIN
HUGH F. OATES
EILEEN T. LEAHY
SHIRLEY RANSOM
Attorneys

National Highway Traffic
Safety Administration
Department of Transportation

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1392, provides in pertinent part:

> (a) Establishment
>
> The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.
>
> (b) Applicability of administrative procedure provisions
>
> Subchapter II of chapter 5, and chapter 7, of title 5 shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.
>
> * * * * *
>
> (e) Amendment and revocation of standards
>
> The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.
>
> (f) Factors to be considered in prescribing standards
>
> In prescribing standards under this section, the Secretary shall—
>
> (1) consider relevant, available motor vehicle safety data, including the results of re-

search, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

2. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706, provides in pertinent part:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*

Of Counsel:
DONALD P. McHUGH
Vice President and
General Counsel
State Farm Mutual
Automobile Insurance Co.

JAMES F. FITZPATRICK *
MICHAEL N. SOHN
JOHN M. QUINN
MERRIOUK B. GARLAND
BONNI FULDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Respondents State Farm Mutual Automobile Insurance Company, et al.

* *Counsel of Record*

February 7, 1983

QUESTION PRESENTED

Whether the decision by the National Highway Traffic Safety Administration to revoke the "passive restraint" requirements of Federal Motor Vehicle Safety Standard 208 was arbitrary and capricious.

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COUNTER-STATEMENT OF THE CASE

I. THE RATIONALE FOR PASSIVE RESTRAINTS: REDUCING THE CARNAGE ON THE HIGHWAYS

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 15 U.S.C. §§ 1381 *et seq.*, in response to the "grim roll of Americans lost and maimed on the Nation's highways." S. Rep. No. 1301, 89th Cong., 2d Sess. 1 (1966). Fifty thousand people were expected to die from automobile accidents in that year alone, and Congress feared that many more would join that roll if the "accelerating spiral of death" were not arrested.

During the next decade, the deaths did not stop. In 1980, motor vehicle crashes were the sixth leading cause of death; they were the leading cause of death for those under the age of 50. An average of 140 persons died every day in traffic accidents—a total of 51,077 fatalities. DOT, Motor Vehicle Safety '80 at 1, 3 (1981).

Moreover, as the Department of Transportation ("DOT") has pointed out, "fatalities are only part of this major public health problem." *Id.* at 2. Two of every three people born today are likely to be injured in a crash in their lifetimes. More than 4 million people are injured in automobile crashes each year, of whom 1.9 million require hospital treatment. Vehicle crashes are the most common cause of paraplegia and a major cause of epilepsy. "From an economic standpoint, . . . about $50 billion is spent in medical and rehabilitation costs, lost wages, welfare and property damage" each year. *Id.*

As the legislative history of the Safety Act makes clear, Congress had no confidence that the automakers would voluntarily make their products safer. Accordingly, it called for the "unconditional imposition of mandatory [safety] standards at the earliest practicable date [as] the only course commensurate with the highway death and injury toll." S. Rep. No. 1301 at 4. Moreover, Congress explained that one of its principal concerns was the " 'second collision'—the impact of the

individual within the vehicle against the steering wheel, dashboard, windshield, etc."—after the first collision between the automobile and another object. *Id.* at 3. Responding to that concern, DOT made one of its first actions under the Act the promulgation of Federal Motor Vehicle Safety Standard 208, which required the installation of seat belts in all passenger cars. 32 Fed. Reg. 2408 (1967). By preventing or minimizing the impact of the "second collision," such devices substantially reduce the risk of death or serious injury in traffic accidents. NHTSA, Final Regulatory Impact Analysis at IV-8 (Oct. 1981) (R. 64) [hereinafter, "NHTSA FRIA"].[1] As the Sixth Circuit has explained, the "idea is to assure that when the car stops dead, the passengers don't." *Chrysler Corp.* v. *DOT*, 472 F.2d 659, 663 (1972). Investigations by the National Highway Traffic Safety Administration ("NHTSA") have found that an occupant is 57 percent less likely to be injured or killed in a crash if he is wearing a seat belt. DOT, Motor Vehicle Safety, *supra* at 5.[2]

DOT soon recognized, however, that although existing manual belts could drastically reduce deaths and injuries if used, "only a very low percentage of the motoring population" was fastening its belts. 34 Fed. Reg. 11,148 (1969) (R. 2503). Today that figure is still only 11%,

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[1] "R. ——" refers to the joint appendix filed by the parties in the court of appeals and lodged with the Clerk of this Court. "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 82-354.

[2] Respondents have lodged with the Clerk a copy of a film produced by the Insurance Institute for Highway Safety which demonstrates the impact of the "second collision" on unrestrained automobile occupants and depicts the mitigating effect of a passive restraint system. The film was part of the passive restraint rulemaking record, and respondents urge the Court to view it in order to understand fully the problem to which the standard was addressed. Stills from the above-described film are contained in a separate appendix filed with this brief. Also included in that appendix are pictures of the various kinds of automatic belt systems discussed below.

NHTSA FRIA at IV-21 (R. 77), and every effort to increase it through educational campaigns has failed. *See infra* pp. 43-44. "More than one half of all the fatalities and far more than one half of all the serious injuries that occur on our nation's highways occur in vehicles in which the passengers or drivers were sitting on safety belts at the time of the accidents." [3]

As long ago as 1969, DOT saw the obvious solution to this dilemma: "the interests of motor vehicle safety demand the prompt development and installation of passive restraint systems"—*i.e.*, systems which do not require any affirmative action by the occupant (such as buckling a belt) to be effective. 34 Fed. Reg. at 11,148 (R. 2503). Because such automatic systems would require no affirmative action to provide protection, they were expected vastly to improve the low usage rates of manual belts. Therein lay their life-saving potential: NHTSA has estimated that for each increase of only 1 percentage point in belt use, 180 lives would be saved annually. NHTSA FRIA at IV-91 (R. 147).

II. THE HISTORY OF THE PASSIVE RESTRAINT RULE

DOT issued its first notice of proposed rulemaking on the subject of passive restraints in 1969. 34 Fed. Reg. at 11,148 (R. 2503). After three years of study, the Department issued a final amendment to Standard 208, requiring the installation of passive restraint systems in vehicles manufactured after August 15, 1975. In the interim period, from 1973 until 1975, the manufacturers were permitted to install either passive restraints or manual belts coupled with ignition interlocks. 37 Fed. Reg. 3911 (1972) (R. 2348).

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[3] Statement of NHTSA Administrator Peck, *Hearing on Small Car Safety Research Before the Subcomm. on Transportation, Aviation and Materials of the House Comm. on Science and Technology*, 97th Cong., 2d Sess., Tr. at 6 (Dec. 3, 1982) [hereinafter, "Peck Subcomm. Testimony"].

The automobile manufacturers immediately filed suit to challenge the rule, and in *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (1972), the Sixth Circuit upheld the agency's decision to require passive restraints. However, because the court found that DOT had used an invalid test dummy in setting performance specifications for restraint systems, the court stayed the effectiveness of the rule pending correction of the error. *Id.* at 681.

In the meantime, the manufacturers had chosen to comply with Standard 208's interim requirements by installing ignition interlocks rather than passive restraints. Letters to Congress expressing irritation at being unable to start cars without fastening belts led to a legislative prohibition of the interlock requirement in 1974. *See* 15 U.S.C. § 1410b(b)(1). Congress did not disapprove the passive restraint standard itself, however. Indeed, it rejected a proposed amendment which would have banned the standard, adopting instead a provision that simply subjected any safety standard requiring compliance by airbags to a legislative veto. *See State Farm Mutual Automobile Insurance Co.* v. *DOT*, Pet. App. 8a, 34a (D.C. Cir. 1982) (citing legislative history). DOT spent the following years successfully correcting the test dummy problems involved in the *Chrysler* decision. *See* 42 Fed. Reg. 34,289, 34,290 (1977) (R. 1735).

In 1976, DOT Secretary William Coleman reviewed the passive restraints issue. He concluded that "passive restraints are technologically feasible, would provide substantially increased protection to the public in traffic accidents, and can be produced economically." Specifically, he found that "passive restraint technology . . . can be expected to prevent thousands of deaths and tens of thousands of injuries annually on the nation's highways." DOT, The Secretary's Decision Concerning Crash Protection at 6 (1976) (R. 2073) [hereinafter, "Coleman Decision"]. Secretary Coleman concluded, however, that the public should have more experience with passive restraints before they were made mandatory. *Id.* at 6

(R. 2073). Accordingly, he launched a demonstration program, contemplating contracts with the automakers for the production of up to 250,000 passive-equipped vehicles per year. *Id.* at 8 (R. 2075).

In 1977, DOT again proposed a timetable for mandatory installation of passive restraints. Like Secretary Coleman, Secretary Brock Adams concluded that the installation of passive restraints would prevent thousands of deaths and tens of thousands of injuries. 42 Fed. Reg. at 34,298 (R. 1743). On July 5, 1977, he issued an implementation schedule for the passive restraint standard.[4] Another judicial challenge was filed, and the court again upheld the standard. *Pacific Legal Foundation* v. *DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). Congress declined to exercise its legislative veto, and the Senate committee with jurisdiction over NHTSA affirmatively endorsed the passive restraint rule. S. Rep. No. 481, 95th Cong., 1st Sess. 2 (1977).

III. PASSIVE RESTRAINTS ON THE HIGHWAYS: A RECORD OF PROVEN EFFECTIVENESS

In the years since the first notice of rulemaking was issued in 1969, a wide variety of passive restraint systems have been installed in automobiles and shown to work effectively. Between 1972 and 1976, approximately 10,000 GM vehicles were equipped with airbags, which are stored in the dashboard and inflate upon impact to protect the rider from collision with the car's interior. 42 Fed. Reg. at 34,290 (R. 1735). Because airbags provide automatic protection and cannot be deactivated, they have "100%" usage rates. On-the-road experience has convinced NHTSA that airbags are technologically sound and provide effective crash protection. NHTSA FRIA at XI-4 (R. 264).

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[4] Giving the automakers over four years lead time, the final schedule required installation of passive restraints in large cars by September 1, 1981, in mid-size cars by September 1, 1982, and in small cars by September 1, 1983. 42 Fed. Reg. at 34,289 (R. 1734).

Since 1975, automatic seat belts, which move into place automatically (without "buckling up") as the passenger enters the vehicle and closes the door, have been installed in over 350,000 Volkswagen Rabbits and in 8,000 1978 and 1979 GM Chevettes. Approximately 13,000 1980 Chevettes were also equipped with automatic belts, as were 1980 Toyota Coronas (as an option) and 1981 Toyota Cressidas (as standard equipment).[5] NHTSA has described all of these automatic belt designs as either practically or literally "nondetachable." Pet. App. 98a.[6] In the case of the 1980 Chevettes and 1980-81 Toyotas, egress may be obtained either by opening the door (which "opens" the belt) or, in an emergency, by reeling out the belt to create the necessary slack. *See infra* pp. 31-34.

Studies conducted by NHTSA of automatic belt systems already in service have revealed usage rates of at least 70%, which is approximately 40 percentage points higher than the usage rates of manual belts in the same models. Pet. App. 96a. According to NHTSA's most recent estimates, these levels of increased belt usage could prevent some 7,000 additional fatalities and 130,000 additional injuries over the lifetime of the automobiles sold

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[5] Pet. App. 98a; NHTSA FRIA at IV-29 (R. 85); NHTSA Hearing Tr. at 82 (Aug. 5, 1981) (R. 2549); NHTSA, Automobile Occupant Crash Protection Progress Rep. No. 3 at 27 (July 1980) (R. 1628) [hereinafter, "NHTSA Prog. Rep."]. NHTSA has given its Safety Award for Engineering Excellence to Toyota's version of the nondetachable automatic belt.

[6] The terms "detachable" and "nondetachable" as used by NHTSA are misleading, since most passive restraint systems now in use have some detachable feature. The VW Rabbit system is fully detachable, but because it is guarded by an ignition interlock it can only be detached after the car has been started. Notwithstanding this, NHTSA has said that "[t]he Rabbit automatic belts are, as a practical matter not permanently detachable." Pet. App. 98a. Although GM's Chevette system can also be partially detached at the lap, NHTSA has described it as "both practically and literally nondetachable," since "the [shoulder] belt remains attached at both ends." *Id.*

in each model year. NHTSA FRIA at IV-61 to 62 (R. 117-18).

Thus, on the eve of the deadline for commencing the mandatory installation of passive restraints, a wide variety of restraint technologies had already been utilized by the automakers and proven effective. Moreover, the manufacturers had already expended a substantial portion of the capital investment necessary to meet the deadline.[7] And every Secretary of Transportation since 1969 had agreed that the installation of such devices would save countless lives.[8] Yet, in February 1981—barely three weeks into a new Administration—NHTSA set in motion the administrative process that would ultimately lead to abandonment of the government's long-standing commitment to passive restraints.

IV. NHTSA'S DECISION TO RESCIND

The effort to dismantle the passive restraint program began with a proposal in February 1981 to postpone the implementation date by one year. Even at that time, the new Administration recognized that "it is likely that the delay caused by this alternative would cost an additional 9,000 deaths." NHTSA Feb. RA at IV-4. The express justification was the economic "difficulties of the automobile industry and some of its members." 46 Fed. Reg. 12,033 (1981) (R. 1622). Two months later, the agency adopted a partial delay proposal, again stressing

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[7] Pet. App. 13a; NHTSA, Regulatory Analysis at V-2 (February 1981) [hereinafter, "NHTSA Feb. RA"].

[8] As late as July 1980, NHTSA reported that:

> "On the road experience in thousands of vehicles equipped with air bags and automatic safety belts has confirmed agency estimates of the life-saving and injury-preventing benefits of such systems. When all cars are equipped with automatic crash protection systems, each year an estimated 9,000 more lives will be saved, and tens of thousands of serious injuries will be prevented." NHTSA Prog. Rep., *supra* at 4 (R. 1627).

the "economic situation of the industry." 46 Fed. Reg. 21,172, 21,174 (1981) (R. 1274). On the same day, NHTSA proposed the rescission of the standard. 46 Fed. Reg. 21,205 (1981) (R. 12). Both decisions were announced by the White House Press Office as part of a larger package of "Actions to Help the U.S. Auto Industry." (R. 1281, 1321).

The agency's Notice of Proposed Rulemaking indicated that NHTSA intended to review the standard to determine whether it "met the requirements of cost-effectiveness provided by Exec. Order No. 12991, 46 Fed. Reg. 13,193 (1981)." Brief for the Federal Parties at 8 n.9. *See* 46 Fed. Reg. at 21,205 (R. 12). Accordingly, three cost-benefit analyses were performed by professional economists and submitted to the docket. All three confirmed that the benefits of the rule far exceeded its cost. (R. 511, 606, 714.) In the words of Professor William Nordhaus of Yale University:

> "[T]he passive restraint rule is, from an economic point of view, as important as any environmental, health, or safety rule on the books. If the estimates of the impact on fatalities and injuries are accurate, a rescission would be equivalent to repealing a law that cuts in half the homicide rate. It is equivalent to foregoing the medical advances that allowed the virtual elimination of death from tuberculosis over the last quarter century." (R. 514.)

Notwithstanding these findings, the new NHTSA Administrator rescinded the rule on October 29, 1981—over the unanimous opposition of his senior staff. *See* Statement of NHTSA Admin. Peck, Press Conference Tr. at 25 (Oct. 23, 1981) (R. 1269); Peck Subcomm. Test., *supra* at 29-30. This time, however, the asserted justification was neither the economic state of the auto industry, nor—in light of the economists' calculations—an unfavorable cost-benefit analysis. Rather, the rescission was now premised almost entirely on the fact that some manufacturers had threatened to meet the standard by

using a new, so-called "detachable" automatic belt. Unlike any passive restraint device in use prior to 1981, NHTSA suggested, the new design permitted the occupant to separate or "detach" the system with such relative ease as to invite disuse. Although six months before, the agency had described these devices as "poorly designed," [9] NHTSA now cited this development as the basis for rejecting as irrelevant its prior studies of automatic belt systems. Pet. App. 92a, 97a. *See* NHTSA FRIA at IV-51 (R. 107). Instead of adopting the obvious suggestion pressed in the rulemaking—that NHTSA bar the new, easily detachable belt as a means of complying with the standard—the agency abandoned the standard altogether.

The respondents in the present action petitioned for review in the District of Columbia Circuit. After reviewing the 12-year rulemaking record, the Court of Appeals found the agency's decision to revoke the rule "a paradigm of arbitrary and capricious agency action because NHTSA drew conclusions that are unsupported by evidence in the record and then artificially narrowed the range of alternatives available to it under its legislative mandate." Pet. App. 4a. The only explanation the court could find for the agency's action was that its "analysis . . . has been distorted by solicitude for the economically depressed automobile industry—which is not the Agency's mandate—at the expense of consideration of traffic safety, which is." *Id.* at 70a. As Judge Edwards observed in concurrence, "the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand." *Id.* at 75a-76a.

Accordingly, the court vacated the rescission and remanded the matter to the agency. *Id.* at 161a. However, because the effect of vacating the rescission was to leave the prior rule standing, and because the deadline for

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[9] NHTSA, Final Regulatory Impact Analysis at V-24 (April 1981) (R. 2548) [hereinafter, "NHTSA April RIA"].

installation of passive restraints under that rule was then only one month away, the court stayed the effectiveness of its order until September 1983.

SUMMARY OF ARGUMENT

By its decision in this case, NHTSA abandoned a concededly life-saving rule because the auto industry threatened to comply with a device that the agency believed would defeat the rule's purpose. Hence, this is not, as petitioners attempt to portray it, a case in which an agency exercised its discretion in a reasonable, if debatable, fashion. Nor is it a landmark case in which the court of appeals improperly limited an agency's ability to deregulate by applying too strict a standard of review. Here, the agency failed altogether to "exercis[e] the discretion with which Congress has empowered it." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). Instead, it simply transferred that discretion wholesale to the very industry it was established to regulate. NHTSA's action cannot withstand the "thorough, probing, in-depth review" which this Court has traditionally applied to ensure that informal rulemaking is not arbitrary and capricious. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971).

There is no uncertainty as to the essential facts. The record establishes that existing passive restraint technology—either automatic seat belts or airbags—would dramatically reduce the loss of life and serious injury which occur in the "second collision," between the automobile occupant and the windshield or other parts of the vehicle's interior. Over the past decade, almost 400,000 automobiles have been equipped with automatic seat belts. NHTSA *concedes* that if all new cars were equipped with automatic belts like those already in existence, they would substantially improve upon the usage rates of manual belts, would prevent a substantial number of deaths and injuries, and would make the rule cost-beneficial. NHTSA's own figures indicate that a manda-

tory passive restraint rule would save thousands of lives, tens of thousands of injuries, and billions of dollars.

In response to Congress' express concern with the carnage caused by the "second collision," NHTSA has studied a passive restraint rule since 1969, and has had one in effect since 1977. Yet, despite all of the foregoing evidence, the agency has now rescinded that rule. According to NHTSA, it did so because various automakers indicated they would comply, not with the already road-tested belts or airbags, but with new belts that could be easily detached and stowed away. Those belts, said the agency, would be much like the old manual belts. Hence, it could not conclude that the demonstrated improvements in usage would apply to the belts the manufacturers now planned to install.

As the court below found, "the absurdity of this Orwellian reasoning [is] obvious." The agency has turned its organic statute, the Safety Act, on its head. That Act was borne out of Congressional dissatisfaction with the pace of industry's development of safety equipment. Accordingly, Congress instructed NHTSA to force the development of new and *better* technology through the imposition of mandatory safety standards. Instead, in this case the agency surrendered to the industry's decision to use technology allegedly *worse* than that already on the road.

The record refutes NHTSA's conclusion that the new belts would not have substantial safety benefits. But even if the new belts were as bad as NHTSA said, the agency had before it an obvious alternative to rescinding the rule: it could simply have barred the new design as a means of compliance. Although the new NHTSA Administrator considered that alternative, he summarily rejected it. Instead, over the unanimous opposition of his expert staff, he reversed the agency's decade-long commitment to passive restraint technology and rescinded the rule outright. In this context, affirmance of NHTSA's rescission by the court of appeals would have amounted to rubber-stamp approval of arbitrary agency action.

ARGUMENT

I. THE RESCISSION OF THE PASSIVE RESTRAINT RULE IS SUBJECT TO THE TRADITIONAL "ARBITRARY AND CAPRICIOUS" TEST

The standard of review appropriate for the informal rulemaking conducted by NHTSA in this case is well established. The Safety Act expressly provides that both the procedural and judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59; 5 U.S.C. §§ 701-06, "shall apply to all orders establishing, amending, *or revoking* a Federal motor vehicle safety standard." 15 U.S.C. § 1392(b) (emphasis added). The 1974 Amendments to the Safety Act further specify that "[s]ection 553 of Title 5 shall apply" to occupant crash protection standards. 15 U.S.C. § 1410b(c)(2). As this Court has made clear, where informal rulemaking is conducted pursuant to section 553 of the APA, "agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Citizens to Preserve Overton Park*, 401 U.S. at 414, *citing* 5 U.S.C. § 706(2)(A).

The scope of "arbitrary and capricious" review is also well recognized. As the Court explained in *Overton Park*, the standard is ultimately deferential and does not authorize the court to substitute its judgment for that of the agency. Nonetheless, such deference does "not . . . shield [the agency's] action from a thorough, probing, in-depth review." Moreover, the court's "inquiry into the facts is to be searching and careful." 401 U.S. at 415, 416.

A. Petitioners Have Attacked Strawman Arguments Regarding the Standard of Review

Petitioners have devoted the bulk of their briefs to establishing three basic legal propositions: (1) that the "burden of proof" in this case rests on those challenging NHTSA's decision, not on the agency; (2) that a regulation may be rescinded if there is substantial uncertainty

that it will work as expected; and (3) that the post-enactment legislative history of the Safety Act does not heighten the standard of review of NHTSA's actions.

Respondents agree with each and every one of these points. As set forth in State Farm's Brief in Opposition to the Petitions for Certiorari at 9-16, respondents believe that the court below also agreed with these points, and that petitioners have twisted that court's words out of context in order to make this appear to be a landmark case on legal doctrine—which it is not—rather than the intensely factual case which it is. Co-respondent National Association of Independent Insurers discusses this point in detail in Part III of its brief before this Court, with which State Farm joins.

In any event, petitioners' challenges to the court of appeals' analysis may be put "aside as irrelevant, since [this Court] must decide whether the action of the court below was correct, irrespective of the reasoning by which such action was induced." *ICC* v. *Illinois Central R.R.*, 215 U.S. 452, 471 (1910).[10] The question before this Court is not whether the court of appeals acted in an arbitrary and capricious fashion, but whether the agency did.

B. The Federal Parties' Proposal for a Radical New Definition of "Arbitrary and Capricious" Should Be Rejected

Despite the well-settled *Overton Park* formula, the federal parties propose a radical new definition of the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A)—one which both analogizes that standard to "minimum rationality" analysis under the Due Process Clause, and at the same time equates it with the requirement of 5 U.S.C. § 706(2)(C) that an agency's action not exceed

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[10] A "prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

the scope of its statutory authority. Brief for the Federal Parties at 22-29.

The federal parties are unable to cite a single opinion of any court that has made the suggested analogy between the APA and the Due Process Clause. That is hardly surprising, since review of administrative action under the APA and review of legislative action under the Constitution are readily distinguishable. The powers of Congress and the state legislatures are both superior to the delegated powers of administrative agencies and entitled to greater deference because of the need to avoid unnecessary constitutional conflict.[11]

The two cases cited by the federal parties also contradict petitioners' assertion that the "arbitrary and capricious" standard is merely a variant of the rule that agency action may not exceed the scope of agency authority as delegated by Congress. Both cases expressly treat the two as independent requirements, *ICC* v. *Union Pacific R.R.*, 222 U.S. 541, 547 (1912); *ICC* v. *Illinois Central R.R.*, 215 U.S. at 470, as does the legislative history, *see* S. Doc. No. 248, 79th Cong., 2d Sess. 213-14, 278 (1946). So, of course, does the statute. *Compare* 5 U.S.C. § 706(2)(A) *with* § 706(2)(C). And *ICC* v. *Union Pacific* makes the further point that "arbitrary and capricious" is not only a separate standard, but that it requires the court to review the factual basis of the

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[11] Petitioners' suggestion that the APA was intended to incorporate the scope of Due Process review found in the two 1910-1912 cases cited in the text, *infra*, is surprising. As this Court is well aware, in 1910-1912 the standard of due process review applied by the Supreme Court was the strict scrutiny of *Lochner* v. *New York*, 198 U.S. 45 (1905), not the "minimum rationality" analysis of the substantially later cases cited in petitioners' brief. Moreover, the suggestion that the APA was intended to do no more than incorporate an existing standard of review ignores the major theme of that statute's legislative history: that administrative agencies had become too powerful, and that *more stringent* judicial review of agency action was necessary. *See* S. Doc. No. 248, 79th Cong., 2d Sess. 217, 278, 337, 383 (1946).

agency's decision—not merely its consistency with its governing statute. 222 U.S. at 547, 548. This Court made the same two points in *Overton Park*.[12]

Not surprisingly, neither the Motor Vehicle Manufacturers Association ("MVMA") nor the Pacific Legal Foundation has joined the federal parties on this point. No doubt the private petitioners recognize that the definition of "arbitrary and capricious" applied in this case will also apply to other cases, and thus will govern the actions of future Administrations which may be as eager to regulate as this one is to deregulate. Before urging a new standard which would have the judiciary abdicate its traditional reviewing role and simply rubber-stamp agency decisions, the federal parties would do well to remember Justice White's words in *Burlington Truck Lines*:

> "[E]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' 'Congress did not purport to transfer its legislative power to the unbounded discretion of [a] regulatory body.'" 371 U.S. at 167 (emphasis in original).

C. MVMA's Proposed "Narrower than Arbitrary and Capricious" Standard Should Also Be Rejected

MVMA argues that the rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place—a standard considerably narrower than the traditional arbitrary and capricious test, and in fact

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[12] "Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 401 U.S. at 416.

"close to the borderline of nonreviewability." MVMA (Court of Appeals) Brief at 18. *See* MVMA (Supreme Court) Brief at 35. That extremist position should be rejected for three reasons.

First, the Safety Act expressly equates an order "revoking" a safety standard with one "establishing" such a standard for purposes of both rulemaking procedure and judicial review. 15 U.S.C. § 1392(b). Indeed, the APA itself defines "rule making" as the process of "formulating, amending, *or repealing* a rule." 5 U.S.C. § 551(5) (emphasis added). *See NRDC* v. *EPA*, 683 F.2d 752, 760-64 (3d Cir. 1982). Neither the Safety Act nor the APA suggests any similar equivalence for orders "refusing" to promulgate standards in the first place, which have traditionally been reviewed much more narrowly than other kinds of agency action. *See NRDC* v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

Second, a revocation is substantially different than a mere failure to act, because revocation constitutes a *reversal* of the agency's former views as to what course is both in the public interest and consistent with the intent of Congress. As was stated in *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973), a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Accordingly, a long line of judicial opinions require that "an agency changing its course must supply a *reasoned* analysis" of the factors justifying a change. *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (Leventhal, J.) (emphasis added), *cert. denied*, 403 U.S. 923 (1971).[13]

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[13] *See, e.g., NLRB* v. *Weingarten*, 420 U.S. 251, 268 (1975) (Burger, C.J., dissenting) ("the change ought to be justified by a reasoned Board opinion"); *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1954) (the change must be "adequately" ex-

MVMA's assertion that there has been no reversal of course in this case is patently false. NHTSA has clearly reversed the implementation order which had been a final rule since 1977. But more important, NHTSA's conclusion that it could not find that passive restraints were effective reversed the contrary findings of every DOT Secretary since 1969. *See supra* pp. 3-7. Secretary Coleman was no exception to that consistent course. Although he was not yet prepared in 1976 to reinstate the rule which the *Chrysler* court has suspended, he did find that passive restraints were "a reliable and effective means of substantially reducing deaths and injuries on the nation's highways." Coleman Decision, *supra* at 10 (R. 2077).[14] That was still the agency's view when it released its July 1980 Progress Report (R. 1627). *See supra* note 8. Indeed, even the present Administration adhered to that view as late as February 1981. NHTSA Feb. RA at IV-4 ("It is likely that [a one-year delay] would cost an additional 9,000 deaths."). Given that prologue, the agency's announcement six months later that it was suddenly unable to determine the efficacy of passive restraints cannot be viewed as anything less than a sharp reversal of course.

Third, the concerns that mandate a narrow standard of review where an agency refuses to conduct rulemak-

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plained); *NRDC* v. *EPA*, 683 F.2d at 760; *Wheaton Van Lines, Inc.* v. *ICC*, 671 F.2d 520, 522 (D.C. Cir. 1982); *Roadway Express, Inc.* v. *NLRB*, 647 F.2d 415, 419 (4th Cir. 1981).

The courts' insistence that agencies provide reasoned explanations for their changes of course is primarily intended not to protect justified reliance, but rather to ensure that prior policies and standards are not being "ignored" in a manner "indifferent to the rule of law." *CBS* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). This judicial concern is applicable whether or not the final rule has actually gone into effect. *Cf. NRDC* v. *EPA*, 683 F.2d at 760-64 (postponement of final rule, even before its effective date, is subject to APA rulemaking procedures).

[14] Specifically, Secretary Coleman concluded that the installation of passive belts alone would save 6,800 lives per year, while installation of airbags would save 9,100 lives. *Id.* at 40 (R. 2107).

ing in the first instance are simply inapplicable to revocations of existing rules. In the latter situation, review does not require the agency to divert its resources to areas which it has never considered important, nor does it require the court to review "nondecisions" in the absence of a factual record. Here, the agency has made passive restraints one of its highest priorities for twelve years, and there is a substantial rulemaking record available for judicial review. Indeed, the very case that MVMA cites as establishing the narrow standard for agency inaction, *NRDC* v. *SEC*, expressly states that that standard is inapplicable to agency reversals. 606 F.2d at 1049 n.23.

Petitioners have been unable to cite a single case in which a court has applied the narrow "agency inaction" test to the revocation of a rule. To the contrary, every case respondents have been able to discover involving agency "deregulation" has applied the traditional arbitrary and capricious test.[15] This Court applied precisely that standard in upholding the FCC's rescission of its policy of regulating radio program formats in *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 n.30 (1981).

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Although petitioners strive to portray the court of appeals as having applied a novel standard of review, in the end they concede that the "court below . . . went on to declare that '[b]y *any* measure of reasoned decisionmaking, NHTSA's action was arbitrary and capricious.'" Brief for Consumer Alert and Pacific Legal Foundation at 24 (emphasis in original) [hereinafter, "PLF Brief"], *quoting* Pet. App. 68a. Accordingly, the ultimate ques-

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[15] *See Action on Smoking and Health* v. *CAB*, No. 79-1044, slip op. at 12-13 (D.C. Cir. Jan. 28, 1983); *NAACP* v. *FCC*, 682 F.2d 993 (D.C. Cir. 1982); *National Tour Brokers Ass'n* v. *ICC*, 671 F.2d 528, 530, 533 (D.C. Cir. 1982); *Wheaton Van Lines, Inc.* v. *ICC*, 671 F.2d 520, 527 (D.C. Cir. 1982); *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1149 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982); *ILGW* v. *Donovan*, Civ. No. 81-2606, slip op. at 7 (D.D.C. July 23, 1982).

tion before this Court is not whether the court below applied too strict a standard of review, but rather whether the actions of the agency were arbitrary and capricious under the well-recognized *Overton Park* standard. Analysis of the facts before the court of appeals demonstrates that NHTSA's rescission was indeed "arbitrary and capricious."

II. IT WAS ARBITRARY AND CAPRICIOUS TO RESCIND BECAUSE OF A NEW, ALLEGEDLY INEFFECTIVE BELT DESIGN WHEN EFFECTIVE PASSIVE RESTRAINTS WERE ALREADY IN SERVICE

As the legislative history makes abundantly clear, Congress enacted the Safety Act because it believed that the automakers' voluntary efforts to improve automobile safety had "largely failed." [16] "The only course commensurate with the highway death and injury toll," said the Senate Committee on Commerce, was the "unconditional imposition of mandatory standards at the earliest practicable date." S. Rep. No. 1301, *supra* at 4. Accordingly, the Act directs that the Secretary of Transportation "shall" establish mandatory motor vehicle safety standards. 15 U.S.C. § 1392(a).

Congress declared that "safety" was to "be the overriding consideration in the issuance of [the] standards." S. Rep. No. 1301 at 6. *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). Those standards were to be performance standards, concentrating not on the design

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[16] S. Rep. No. 1301, *supra* at 4. The Senate Commerce Committee summarized its findings as follows:

> "[T]he committee met with disturbing evidence of the automobile industry's . . . overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection. The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in industry which has plainly resulted in the inadequate allocation of resources to safety engineering." *Id.* at 2.

of a particular safety device, but rather on the required minimum level of safety improvement it must attain. S. Rep. No. 1301 at 6. Moreover, because Congress had become disenchanted with the voluntary efforts of the automakers, it intended the standards to be "technology forcing." That is, they were to go beyond existing technology and were "to impel automobile manufacturers to develop and apply new technology to the task of improving the safety design of automobiles as readily as possible." *Chrysler Corp.* v. *DOT*, 472 F.2d at 671-72. *See* S. Rep. No. 1301 at 1, 10. As the Department of Justice explained to the Sixth Circuit, an "important reason for passage of the [Safety] Act was to insure that the pace of safety measures would *not* be left to industry." Brief for the Dep't of Justice, *Chrysler Corp.* v. *DOT*, at 62 (emphasis in original).[17]

The irony of this case is that here NHTSA did not need to compel the development of new technology. On the contrary, NHTSA rescinded Standard 208 despite the fact that passive restraint devices already in service in thousands of cars had been proven effective by the agency's own studies.

A. NHTSA Concedes that Effective Passive Restraints Already Exist

As set out in detail in the Counter-statement of the Case, *supra* at 5-7, since the early 1970's 10,000 automobiles have been equipped with airbags and almost 400,000 have been equipped with automatic belts of various designs. NHTSA has described all of the automatic belt designs so far in use as either practically or literally "nondetachable." Pet. App. 98a; *see supra* note 6. NHTSA's studies of these automatic belt systems have revealed usage rates of at least 70%, which is approximately 40 percentage points higher than the usage rates

[17] In light of this legislative history, the federal parties' assertion that the "Safety Act essentially embodies a congressional presumption *against* regulation" is frivolous. Brief at 31 n.26.

of manual belts in the same models.[18] According to NHTSA's own current estimates, if introduced into all new cars, these levels of increased belt usage would prevent some 7,000 additional deaths and 150,000 additional injuries over the lifetime of the automobiles sold in *each* model year. NHTSA FRIA at IV-61, 62 (R. 117, 118).

NHTSA has estimated the costs of automatic belts at just $89 per car.[19] By the agency's own analysis, the passive restraint standard's benefits (measured in terms of the savings in productive manpower not lost to injury and death, as well as associated medical savings) would outweigh its costs if usage rates increased by just 13 percentage points over current levels—from 11.4% to 24.4%. NHTSA FRIA at A-10 (R. 283-84); Pet. App. 17a. Yet, NHTSA's surveys of automatic belt systems already installed in hundreds of thousands of automobiles reveal that those devices increased belt use by over 40 percentage points, roughly three times the break-even level. Pet. App. 96a.

All three of the cost-benefit analyses submitted to NHTSA by professional economists confirm this analysis. All three concluded that thousands of deaths and tens of thousands of injuries would be prevented by the installation of passive restraints.[20] All three, using NHTSA's

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[18] Various NHTSA-sponsored studies found that usage rates of automatic belts ranged from 70% to 90%; the increases over the manual belt rates ranged from 38 percentage points to 64 percentage points. Pet. App. 96a; NHTSA FRIA at IV-29, IV-32 to 33 (R. 85, 88-89); *see* R. 824, 871, 922, 1012.

[19] This estimate includes both the cost of the belt and added fuel costs over the life of the car. NHTSA FRIA at A-8 (R. 282). It is 50 to 100% higher in *constant* dollars than cost estimates announced by the agency as recently as 1980. There is good reason to believe that the recent estimate has been overinflated. Graham Comment at 1, 9-12 (R. 606, 607, 615-18). *See* Pet. App. 16a n.9.

[20] Nordhaus Comment at 1 (May 1981) (R. 511); Graham Comment at 7 (May 1981) (R. 612); Arnould & Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 Bell J. Econ. 27, 39 (1981) (R. 714, 726).

own figures, concluded that the benefits of passive restraints—either automatic belts or airbags—would far outweigh their costs. (R. 511, 612, 729-30.) This was the same conclusion that NHTSA itself had reached prior to the 1981 rulemaking, *see, e.g.*, Coleman Decision, *supra* at 49 (R. 2116) (3.5 benefit/cost ratio for passive belts); it is the same conclusion that every cost-benefit analysis ever conducted on passive restraints has reached, *see* U.S. Congress, Office of Technology Assessment, Technology and Handicapped People: Background Paper No. 1, at 34 (Sept. 1982). Indeed, Professor Nordhaus concluded that the *net* economic benefit to society would be $2.4 billion per year and $33 billion over time. Nordhaus Comment at 1 (R. 511).[21]

Finally, it must be emphasized that the foregoing analysis is based, not on a disputed premise, but on NHTSA's own concession that airbags and nondetachable belts would effectively reduce the nation's death and injury toll. As to airbags, NHTSA's Final Regulatory Impact Analysis states:

> "The Agency has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use . . . ." NHTSA FRIA at XI-4 (R. 264).

As to nondetachable belts, although the agency did suggest that *some* of the 40-plus percentage point increase in usage observed in Rabbits and Chevettes might not carry over to other automobiles for demographic rea-

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[21] Respondents agree with NHTSA's view that "the outcome of a dollar-based benefit-cost analysis . . . cannot be used as the sole criterion for decisionmaking." As the agency explains, this is because its "governing statute dictates that while costs and benefits must both be considered, safety is of overriding concern." NHTSA FRIA at A-2 (R. 276). Although that rationale would justify promulgating a standard which provided safety benefits even if its financial benefits did not outweigh its dollar costs, it does not justify rescinding a standard which yields substantial net benefits measured in terms of *both* lives and dollars.

sons,[22] NHTSA concluded that "most of the increase in automatic belt Rabbits and Chevettes is due to the nondetachability feature."[23] Indeed, it concluded that fully four-fifths of the increase could be accounted for by the nondetachability feature and that only the remaining one-fifth could be attributed to demographics. Pet. App. 102a-103a. According to NHTSA's own Final Regulatory Impact Analysis, even that level of increased usage would save almost 6,000 lives and prevent over 100,000 injuries each year. NHTSA FRIA at IV-62 (R. 118).

Throughout the discussion that follows, therefore, it must be kept in mind that *the agency has never expressed uncertainty with regard to the substantial safety benefits of nondetachable belts and airbags.* To the extent that NHTSA has expressed uncertainty, it has done so only with regard to the new detachable belts. Pet. App. 104a-105a. None of petitioners' legal arguments regarding the rescission of regulations under conditions of uncertainty has any relevance whatsoever to nondetachable belts or airbags.

B. Despite the Availability of Effective Passive Restraints, NHTSA Improperly Permitted the Preferences of Some Automakers for An Allegedly Ineffective Design To Govern This Rulemaking

Despite all of the evidence generated by NHTSA in favor of its passive restraint standard, the new Ad-

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[22] As discussed *infra* at 40-41, even that suggestion is contradicted by the record evidence.

[23] NHTSA stated that this was true "whether an interlock or other design feature" was used. It did not suggest that there was any difference, as far as usage rates were concerned, between interlock-guarded belts—which it considered "practically" nondetachable—and those which the agency viewed as "literally" nondetachable. Pet. App. 102a, 98a. In fact, the literally nondetachable belt in the 1980 Chevette was found by the agency to have a slightly higher incremental usage rate than the interlock-guarded belt in the 1978-79 Chevette (39% increased usage versus 38%). NHTSA FRIA at IV-32 to 33 (R. 88-89). *See supra* note 6, which describes these systems.

ministrator revoked the rule on October 29, 1981. The key rationale was a "drastic change" in the plans of the automakers: some had threatened to meet the standard by using an entirely new, "easily detachable" automatic belt. Pet. App. 97a.[24]

Petitioners have endeavored to obfuscate the Administrator's decision by suggesting that there were other "changed circumstances," besides the new detachable belt, which were not anticipated in 1977, and which now render invalid the "assumptions" upon which the rule was originally based. These allegedly were the nation's switch from large to small cars, and the manufacturers' switch from airbags to belts. MVMA Brief at 9 & nn. 18, 21. In fact these changes clearly were anticipated in 1977 and actually strengthen the case for the standard.[25] NHTSA itself has never given any reason

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[24] MVMA endeavors to give the impression that the detachable belts were really nothing new and had always been contemplated. Brief at 43-44. NHTSA plainly disagrees, calling the manufacturers' plans a "drastic change," Pet. App. 97a, and noting that "there are no detachable systems currently available," NHTSA FRIA at IV-51 (R. 107). Although buckle release systems had previously been used, either they did not completely detach the belt, or they were accompanied by ignition interlocks which made them, "as a practical matter, not permanently detachable." Pet. App. 98a. And even those systems were not "easily detach[able]" and stowable, as are the manufacturers' new designs. *Id.* at 97a.

[25] In announcing its 1977 rule, NHTSA explained that an "important consideration" in mandating passive restraints was the "trend toward smaller cars," which were more dangerous in crashes and which had already proven well-suited to passive restraints (65,000 restraint-equipped VW's were already on the road at the time). 42 Fed. Reg. at 34,294-95, 34,290-91 (R. 1739-40, 1735-36). Today, the agency even argues that small car buyers are *more* likely than large cars buyers to accept and use automatic restraints. Pet. App. 98a.

Similarly, the 1977 Final Rule included an analysis of the effect of compliance solely by automatic belts rather than airbags, and concluded that 6,800 deaths and 78,000 serious injuries would still be prevented. 42 Fed. Reg. at 34,298 (R. 1743). Several of the cost-benefit analyses conducted during the instant rulemaking concluded

why any change, other than the manufacturers' decision to install easily detachable belts, led to the rescission.

According to NHTSA, the importance of the manufacturers' decision to use detachable rather than nondetachable belts was that, "unlike the automatic belts in Rabbits and Chevettes," the new belts "would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently."[26] Hence, "[i]nstead of being equipped with automatic restraints that will protect substantially greater numbers of persons than current manual belts, most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts." Pet. App. 97a, 98a, 92a. Although in April 1981 this very analysis had led the agency to characterize the proposed detachable belts as "poorly designed," NHTSA April RIA at V-24 (R. 2548), in October NHTSA seized on that change as the reason for rejecting its prior tests on other designs as irrelevant. Pet. App. 97a-99a.

It is not surprising that the court of appeals found the "absurdity of this Orwellian reasoning . . . obvious." Pet. App. 58a. The agency had simply turned the Safety Act on its head. Instead of forcing the industry to develop new and *better* technology as Congress had contemplated, NHTSA surrendered to the automakers' threat to use technology *worse* than that already on the road. Instead of insisting on a performance standard requiring a certain level of safety results, the agency retreated before an eleventh hour industry decision to use a design which was worse than alternatives known to meet the performance criteria. Hence, this is not, as petitioners attempt

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that automatic belts were even more cost-effective than airbags. Arnould & Grabowski, 12 Bell J. Econ. at 43 (R. 730); Graham Comment at 6 (R. 612).

[26] This assertion gave the court of appeals serious doubts as to whether the detachable belts complied with the passive restraint standard at all. Pet. App. 57a.

to portray it, a case in which NHTSA exercised its discretion in a reasonable, if debatable, fashion. Here, the agency failed altogether to "exercis[e] the discretion with which Congress has empowered it." *Burlington Truck Lines*, 371 U.S. at 168. *See Pillai* v. *CAB*, 485 F.2d 1018, 1030 (D.C. Cir. 1973). Instead, it simply transferred that discretion wholesale to the very industry it was charged with regulating.

C. It Would Have Been Arbitrary and Capricious for NHTSA To Have Ignored the Obvious Alternative of Barring the Allegedly Ineffective Design

NHTSA had obvious alternatives to capituiation to the automakers. Chief among them was plugging the loophole which industry was threatening to use to defeat the very purpose of the passive restraint rule. This could have been done by simply barring compliance by the new type of detachable belt, which would still have permitted compliance by a wide variety of other belt designs, as well as by airbags.

Petitioners have argued at length in their briefs that the agency had no responsibility to consider this obvious alternative and may have been procedurally barred from considering it. Neither of those points has any validity. Moreover, as section D below explains, NHTSA *did* in fact consider the suggested alternative, but rejected it for arbitrary and capricious reasons.

1. *The Agency Could Not Simply Ignore the Obvious Alternative to Rescission.* In *Burlington Truck Lines, Inc.* v. *United States*, this Court set aside an ICC order because the agency had failed to state a rational basis for its choice of one action when another alternative was also available. "The agency," said Justice White, "must . . . 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" There must be a "rational connection between the facts found and the choice made." 371 U.S. at 168.

In *Pillai* v. *CAB*, the District of Columbia Circuit reached the same conclusion. There, the CAB had approved a private, multilateral agreement regarding airline rates without first making a "considered evaluation" of a variety of other alternatives, including bilateral agreements. That "artificial narrowing of options," Judge Wilkey held, was "arbitrary and capricious." 485 F.2d at 1027, 1029. Contrary to petitioners' assertions, neither *Burlington* nor *Pillai* involved statutory provisions which required the agency—explicitly or implicitly—to consider alternatives. Rather, these cases are based on the general proposition of administrative law explained by Judge Wilkey: "*[A]n administrative agency's discretion is the power to make a reasoned choice of alternatives within a class of permissible actions.*" 485 F.2d at 1030 (emphasis in original). The failure to "rationally choose among the possible alternatives" is "either an unsupported exercise of discretion or an arbitrary failure to exercise discretion at all." 485 F.2d at 1029, 1030.[27]

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1977), relied upon by petitioners, is not to the contrary. That case held that reviewing courts may not "engraf[t] their own notions of proper *procedures* upon agencies." *Id.* at 525 (emphasis added). *See id.* at 543, 544, 546. But the requirement that agencies consider the reasonable alternatives to their actions is not a *procedural* requirement at all, but a substantive one. It is not an expansion of the procedural rulemaking requirements of 5 U.S.C. § 553, as was the case in *Vermont Yankee*, but a traditional application of the "arbitrary and capricious" standard set forth in 5 U.S.C. § 706(2)(A).

Vermont Yankee did state that an agency "cannot be found wanting simply because the agency failed to in-

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[27] *See also Food Marketing Institute* v. *ICC*, 587 F.2d 1285, 1292 (D.C. Cir. 1978); *United States* v. *Nova Scotia Food Products*, 568 F.2d 240, 253 (2d Cir. 1977); Exec. Order 12291 § 2(d), 46 Fed. Reg. 13,193 (Feb. 17, 1981) (requiring agencies to choose "the alternative involving the least net cost to society").

clude every alternative device and thought conceivable by the mind of man . . regardless of how uncommon or unknown that alternative might have been . . . ." *Id.* at 551. But that is hardly the situation here. The alternative of barring easily detachable belts—thereby limiting compliance to nondetachables or airbags—was neither novel nor complex. The existing rule expressly authorized nondetachable belts and airbags—indeed it was General Motors which had pressed the agency to permit nondetachable belts in the first place. *See infra* at 33-34. Both devices had already been used effectively in thousands of automobiles; in fact they were the only kinds of passive restraint that had been previously used, and were the very devices that everyone had expected the automakers to use again in 1981. The agency's own cost estimates indicated that nondetachable belts were *less* expensive than the new, easily detachable designs. NHTSA FRIA at VI-37 (R. 199). Accordingly, there could not have been any more obvious alternative than barring compliance with the new, easily detachable belts.

Nor does the obligation to consider obvious alternatives contravene the supposed principle that agencies "are generally free to determine when they will address particular regulatory issues," which MVMA asserts to mean that NHTSA should have been permitted first to rescind the passive restraint standard altogether, and then—at its leisure, if ever—to consider a "nondetachable" rule. As every one of the cases cited by MVMA in support of its "principle" indicates, this is a doctrine which applies to agency *refusals* to act in the first instance.[28] The commentators who proposed barring detachable belts were not asking the agency to "address" a new program; they were asking it to plug a loophole in its existing program.

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[28] *See* MVMA Brief at 40 n.74, *citing WWHT* v. *FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Southland Mower Co.* v. *CPSC*, 619 F.2d 499 (5th Cir. 1980); *National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978).

But more important, it must be remembered that this was not some academic exercise the agency was conducting. NHTSA had agreed that *non*detachable belts *would* boost usage rates substantially, and its own figures revealed that each year's delay in installation would cost the country thousands of deaths and tens of thousands of injuries. *See supra* pp. 20-23. Given that cost, and given that Congress intended "safety" to be NHTSA's "overriding consideration," S. Rep. No. 1301 at 6, it would have been an abuse of discretion to delay consideration of the obvious alternative to rescission.

2. *NHTSA Faced No Procedural Bar to Prohibiting Detachable Belts.* In the court of appeals, MVMA argued that NHTSA would have been procedurally barred from prohibiting the new detachable belt because it had not suggested that specific alternative in its initial Notice of Proposed Rulemaking. MVMA (Court of Appeals) Brief at 62. Both MVMA and the federal parties now appear to have lost confidence in this point, no longer contending that the agency *would* have been barred, but only that if it had prohibited detachables it would have raised a "substantial question," MVMA Brief at 38 n.69, or "might have faced challenges from the manufacturers," Brief for Federal Parties at 37.

It is plain that such challenges would have been without merit. The authorities cited by petitioners merely confirm the well-settled proposition that an administrative agency has the authority to respond to issues and evidence presented in the course of a rulemaking, and to modify its proposals, "so long as the final rule is a 'logical outgrowth' of the proposals highlighted and discussed during the notice and comment period." *Sierra Club* v. *Costle*, 657 F.2d 298, 352 (D.C. Cir. 1981).[29]

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[29] *See* MVMA Brief at 38 n.69, *citing* 5 U.S.C. § 553 ("the notice shall include . . . *either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved"); *Weyerhaeuser* v. *Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978); *American Frozen Food Inst.* v. *Train*, 539 F.2d 107, 134-35 (D.C. Cir. 1979).

As set out above, if the agency felt that detachable belts would not satisfy the safety goals of the statute, there could have been no more "logical outgrowth" to this rulemaking than barring them as a means of compliance. Nor can the automakers fairly contend that the issue was not subsumed within the original Notice, or that it was not fully ventilated in the rulemaking.[30] The value of detachable as compared to nondetachable belts was the central issue in the rulemaking; no party has ever suggested that it had additional evidence on the subject which it refrained from submitting for lack of notice. Accordingly, any imagined procedural objection to considering a bar on detachable belts would have been without foundation.

D. NHTSA Did in Fact Consider Barring the Allegedly Ineffective Design, but Rejected That Alternative for Arbitrary and Capricious Reasons

Although petitioners devote substantial portions of their briefs to arguing that NHTSA neither had to consider, nor could have considered, the alternative of plugging the loophole in the passive restraint rule, the fact is that NHTSA *did* consider that alternative. Pet. App. 109a. Moreover, the reasons that the agency gave for rejecting that alternative did *not* include the two discussed in the preceding section: *i.e.*, a lack of obligation or authority to consider prohibiting detachable belts. Those justifications are merely *post hoc* rationalizations of counsel, entitled to no weight in this Court.[31] Hence, this

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[30] NHTSA's Notice of Proposed Rulemaking called for broad public comment to identify the "most effective and reasonable approach to addressing the serious safety problems posed by the low rate of safety belt use," 46 Fed. Reg. at 21,206 (R. 13). As NHTSA's Final Notice acknowledged, several commentators responded by suggesting that detachable belts be barred. Pet. App. 109a.

[31] "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington*

case presents only one straightforward question: were the actual justifications offered by NHTSA for rescinding the standard, instead of barring compliance by detachable belts, arbitrary and capricious?

That question can only be answered in the affirmative. As the court of appeals discovered, NHTSA did not "devot[e] even a modicum of reasoned analysis" to the proposal to bar detachable belts, "summarily reject[ing]" it in three brief paragraphs, Pet. App. 55a. *See* Pet. App. 109a-110a. The agency's three reasons for rejecting this obvious alternative can only be characterized as "hollow" and "capricious." *Id.* at 56a, 58a.[32]

1. *Emergency Release.* One reason NHTSA gave for declining to bar the new detachable belt was its concern that it not impose a requirement that would "complicate the extrication of any occupant from his or her car" in an emergency. Pet. App. 110a. Such a concern would obviously be proper, if there were support for the notion that it applied to nondetachable belts. However, as the court of appeals noted, "NHTSA has not suggested, nor is there *any* evidence for [the] proposition, that the emergency release mechanisms" used in nondetachable belts are any less effective for emergency egress than the buckle release system used in detachable belts; in fact, the evidence is all to the contrary. Pet. App. 61a (emphasis added).

The device used to obtain emergency egress from a nondetachable belt is known as a "spool release," because it permits the occupant to "spool out" the belt and create the necessary slack. In 1978, General Motors sought NHTSA's permission to use such a device, explaining

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Truck Lines, 371 U.S. at 168-69. *Accord, American Textile Manufacturers Inst.* v. *Donovan*, 452 U.S. 490, 539 (1981).

[32] Indeed, the Comptroller General has recently singled out NHTSA's consideration of the alternatives in this case as a prime example of "poor" agency analysis. GAO, Report on Regulatory Analysis, App. II at 11 (Nov. 2, 1982).

that it would "provide for rapid egress without use of a buckle release mechanism." Nondetachable belts equipped with spool releases, said the automaker, were as safe as detachable belts with buckle releases:

> "[T]here is, to our knowledge, no clear cut advantage of one emergency release system over another. While it appears that release by separation might be slightly more convenient in a particular instance, our evaluations suggest that pushbutton activated buckle release may be difficult for some people in another instance . . . ." 43 Fed. Reg. 21,912, 21,913-14 (1978) (R. 1724-25).

NHTSA agreed, promptly granting GM permission to utilize the device because "the agency does not believe that the use of [such] release mechanisms will cause serious occupant egress problems . . . ." 43 Fed. Reg. 52,493, 52,494 (1978) (R. 1706).

General Motors' belief in the safety of nondetachable belts continued down to the present rulemaking. At the hearing conducted by NHTSA, Administrator Peck asked David Martin, Director of Automotive Safety Engineering for GM, whether nondetachable belts were any less safe than detachables. Mr. Martin had no doubts:

> "CHAIRMAN PECK: In an emergency situation, do you perceive any safety advantages or disadvantages between a complete disconnect and a spool out which you've just described?
>
> "MR. MARTIN: No. That's why we petitioned for the spool out. We think that the spool out is viable from a safety egress point of view under emergency." Hearing Tr. at 94-95 (R. 1225-26).

Faced with this unanswerable rulemaking record—and the unambiguous admissions of its leading member (GM) —the MVMA has attempted to muddy the waters by distorting the history of the emergency release provision, suggesting that NHTSA has had a "continuing . . . commitment to detachability" for reasons of safety. MVMA Brief at 43-44. Nothing could be further from the truth.

From the very first, NHTSA recognized that passive restraints would need to have an emergency release capability. "The agency cautioned, however, that the emergency release capability could not be allowed to nullify the advantages of the passive restraint system." Pet. App. 7a. Accordingly, the first passive restraint notice, issued in 1971, contemplated that a spool release would be used and that detachable belts would be barred. 36 Fed. Reg. 12,866 (1971) (R. 2497).

In 1974, NHTSA did—at the suggestion of an automaker—modify the rule to provide for emergency release by a detachable buckle. It did so, however, *only* because of the availability of ignition interlocks. Although NHTSA recognized that a detachable mechanism might create the "temptation to defeat the passive belt," it concluded that if the buckle were "guarded by" an interlock, so that the car could not be started unless the belt were buckled, that problem would be mitigated. 39 Fed. Reg. 14,593-94 (1974) (R. 2319-20). Accordingly, the agency "permit[ted] belt separation—*provided the restraint system was guarded by an ignition interlock . . . to encourage reattachment . . . .*" Pet. App. 9a.

NHTSA's ability to require manufacturers to guard the emergency buckle with an ignition interlock was removed when Congress banned the interlock in 1974. Accordingly, the agency eliminated the interlock requirement from the passive restraint rule. 39 Fed. Reg. 38,380 (1974) (R. 2309). However, because NHTSA eliminated the interlock without revisiting the emergency release provision, this left the buckle release as the only means of compliance. Pet. App. 10a. Although this did not pose a problem during the next few years, given that the *Chrysler* decision had suspended the rule, Secretary Adams' 1977 reinstatement of the mandatory deadline once again brought the question of emergency release to the fore. Significantly, it was GM which petitioned the agency to permit the use of nondetachable belts equipped with spool releases, emphasizing that such devices would

"maximize automatic seat belt usage," and yet be as safe as detachables. 43 Fed. Reg. at 21,914 (R. 1724). As already described, NHTSA promptly granted GM's petition, and in the following years the only passive belts on the road were those either guarded with ignition interlocks—and so, as NHTSA has described, "practically nondetachable"—or equipped with versions of the nondetachable spool-out release.[33]

In sum, contrary to MVMA's claims, there was no "continuing agency commitment" to detachability for reasons of safety. In the entire history of the passive restraint rule, NHTSA has never questioned the safety of nondetachable belts.

2. *"Widespread and Irrational Fear."* The second reason given by NHTSA for refusing to bar easily detachable belts was that "recent attitudinal research" revealed a "widespread, latent *and irrational* fear in many members of the public that they could be trapped by the seat belt after a crash." That fear, the agency said, could "be a contributory facto[r] in decisions by many people not to wear" a seat belt. Pet. App. 110a (emphasis added).

In fact, the "recent attitudinal research" relied upon by NHTSA does *not* establish the existence of widespread fear—irrational or otherwise. The evidence on which NHTSA relied for this proposition, the 1981 National Safety Belt Study, found that when interviewees were asked why they thought most people did not wear their present manual seat belts, *only 7%* volunteered "fear of being trapped" as the explanation. R. 1108; *see* Pet. App. 60a n.34.[34] NHTSA's own evidence thus directly contradicts the agency's purported rationale.

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[33] *See supra* note 6. Indeed, when a belt manufacturer wrote NHTSA in 1980 to inquire whether a truly detachable belt would still satisfy the requirements of the rule, NHTSA wrote back expressing disapproval of the device. (R. 1636).

[34] Higher percentages were not reached until entrapment was specifically suggested. The only other agency-sponsored research in the record confirms the 7% figure almost exactly. NHTSA FRIA

The MVMA and Pacific Legal Foundation have endeavored to twist NHTSA's point regarding fear of entrapment into a more general assertion that the public is "hostile" to nondetachable belts. MVMA Brief at 45; PLF Brief at 4. This was not, however, one of the reasons NHTSA gave for declining to bar detachables, *see* Pet. App. 52a n.30; it is a *post hoc* justification entitled to no weight. NHTSA itself never found any evidence of widespread public hostility to nondetachable belts, and it dismissed the purported "evidence" which the manufacturers offered on this score as "fallacious."[35] It is plain that the "universal hostility" to which the manufacturers refer is their own.[36]

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at IV-25 (R. 81) (1978 Teknekron study disclosing that only 8% of respondents feel "belts are dangerous"). MVMA's claim that the agency's rationale is "well supported by the record," MVMA Brief at 45 n.88, is purportedly based on two older surveys, commissioned by the automakers themselves, upon which the agency did not rely but which do not materially contradict the agency's surveys. *See* R. 1978, 1981 (responses of 1% and 10%); R. 1639, 1651 (no percentages given). Moreover, all of these surveys were directed at users of manual belts only, and hence provide no data from which any conclusions can be drawn regarding automatic belts.

[35] The manufacturers offered the lack of consumer demand for the 1980 Chevette (which was equipped with a nondetachable belt) as evidence of this consumer hostility. The agency responded that "GM's comparisons of *voluntary* purchases of automatic belts in Chevettes to potential consumer reaction to *mandated* automatic belts may be fallacious." NHTSA FRIA at IX-4 (R. 219). It also pointed out "that Rabbit dealers did more selling of the automatic safety belt feature than GM dealers," NHTSA Prog. Rep., *supra* at 42 (R. 1633), and that "VW's corporate management has testified that it has never experienced any negative reaction to its (Rabbit) automatic belt system," NHTSA FRIA at IX-21 (R. 236).

The manufacturers have also pointed to the "lesson" of the 1974 interlock controversy as evidence of consumer hostility to nondetachable belts. However, as NHTSA rejoined, the "so-called 'ground swell' of protests over the starter interlock actually involved much fewer than 1% of the new car market . . . ." *Id.* at IX-19 (R. 234).

[36] In any event, the relevance of public reaction to passive restraints must be put in perspective. Although the *Pacific Legal*

3. *Congressional Disfavor.* NHTSA's final reason for rejecting nondetachable belts and refusing to bar the new detachables was that the 1974 interlock episode "suggests that Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt system." Pet. App. 109a-110a. That rationale is a *non sequitur.* As NHTSA itself observed in 1977, the characteristic of interlock-guarded manual belts to which Congress objected in 1974—the fact that they require affirmative action (buckling up) in order to start the car—is not a problem with automatic belts. 42 Fed. Reg. at 34,291 (R. 1736). *Accord, Pacific Legal Foundation* v. *DOT*, 593 F.2d at 1346. *See generally* NHTSA FRIA at II-4 (R. 30). Automatic belts, by definition, require "no action" on the part of the occupant. 49 C.F.R. § 571.208 (S.4.1.3(a)).

Nor, as the court of appeals explained in detail, is there anything in the legislative history of the 1974 Amendments which suggests that Congress' distaste for interlocks extended to passive restraints. Congress was quite specific in indicating which parts of Standard 208 it wanted changed,[37] while rejecting an amendment pro-

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Foundation court did—as MVMA states—hold that NHTSA had an obligation to take public reaction into account, it did not—as MVMA implies—mean to suggest that safety standards should be subject to popularity contests. 593 F.2d at 1345. As that court explained, the relevance of public reaction is that it can affect usage rates. Similarly, in this case NHTSA explained that the relevance of whatever "irrational fear" the public might have is that it can be a "contributory facto[r] in decisions by many people not to wear" the belts. Pet. App. 110a. Yet, the agency has already conceded that nondetachable belts will increase usage rates by an amount which can be calculated to save thousands of lives, hundreds of thousands of injuries, and billions of dollars. Hence, even if there were a limited amount of "fear" or "hostility," the agency has effectively conceded that it is insufficient to prevent nondetachable belts from being extremely valuable safety devices.

[37] For example, it required that warning buzzers not exceed eight seconds in duration, banned the interlock, and added a legislative veto provision. *See* 15 U.S.C. § 1410b.

posed by Representative Wyman that would have barred a mandatory passive restraint standard. *See* Pet. App. at 33a-35a. As the petitioners in this case have become fond of saying, "[i]f Congress wishes to require NHTSA to take some specific action on passive restraints, it is perfectly capable of [saying] so." PLF Brief at 15.[38]

* * * *

The most arbitrary aspect of NHTSA's failure to ban the easily detachable belt is not just that the alleged disadvantages of nondetachables were without record support, but that the agency made no effort to explain why those disadvantages (even if true) outweighed the belts' conceded safety advantages. Even assuming that nondetachable belts might impede egress in some circumstances or might engender irrational fears, why do those disadvantages outweigh the prevention of thousands of deaths and tens of thousands of injuries? As the court of appeals pointed out, although the agency attempted to compare the costs and benefits of detachable belts, for nondetachables it did nothing more than list their three alleged disadvantages. Pet. App. 55a.[39]

In short, by its decision in this case, NHTSA abandoned a 12-year commitment to auto safety because the

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[38] NHTSA's Final Order did not contend that events in Congress *since* the 1974 Amendments gave it any insight as to Congress' views regarding passive restraints. Although that post-enactment history may be read as suggesting affirmative congressional approval of passive restraints, *see* Pet. App. 36a-46a, respondents do not dispute petitioners' conclusion that "[n]o significant meaning can be deduced from any of these 'congressional reactions.'" MVMA Brief at 33.

[39] As Justice Powell said in his concurrence in *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 664, 670 (1980), "[n]o rational system of regulation can permit" an agency to "simply announc[e] its finding of cost-justification without explaining the method by which it determines that the benefits justify the costs . . . ." *See* Exec. Order 12291 § 2(b) & (c) (Feb. 17, 1981) (requiring agencies to weigh the costs and benefits of alternative rules, and to choose the one which "maximiz[es] the net benefits to society").

industry it was instructed by Congress to regulate threatened to comply with such regulation by installing devices which constituted the "worst available technology." The agency then rejected the obvious alternative to abandonment for reasons lacking any support in the record, and without weighing those reasons against the conceded life-saving potential of that alternative. "Arbitrary" and "capricious" are, if anything, gentle words to apply to that kind of decisionmaking.

III. IT WAS ARBITRARY AND CAPRICIOUS TO RESCIND EVEN A STANDARD WHICH PERMITTED THE NEW DESIGN

The foregoing analysis has proceeded on the assumption that NHTSA was correct in finding that it could not "reliably predict" the usage rates of detachable belts based on the existing evidence regarding nondetachables. Pet. App. 104a. Respondents have argued that even if that were so, it was arbitrary and capricious to rescind the passive restraint rule altogether, rather than amend it to bar the new design. But in fact, the agency's finding of "substantial uncertainty" regarding the usage rates of detachables was itself arbitrary and capricious. The record evidence established that usage rates far in excess of those necessary to achieve cost-effectiveness would result from the installation of detachable automatic belts. NHTSA simply manufactured uncertainty where none actually existed.

A. Substantial Uncertainty Can Justify Rescission, But Only if It Is Consistent with the Record

The issue before this Court is *not*, as petitioners assert, whether an agency may rescind a regulation because of substantial uncertainty that it will achieve its intended purpose. Respondents do not contend that an agency must go forward with a regulation if the evidence creates justifiable uncertainty as to whether the regulation will be effective. But by the same token, an administrator may not revoke a duly promulgated regulation simply by pro-

nouncing himself "uncertain" of its benefits. A reviewing court must subject this asserted basis for agency action to "a thorough, probing, in-depth review," to determine whether the avowed uncertainty is consistent with the administrative record. *See Citizens to Preserve Overton Park*, 401 U.S. at 415.

B. NHTSA's Finding of Substantial Uncertainty Regarding the Usage Rates of Detachable Belts Was Arbitrary and Capricious in Light of the Record

As explained above, NHTSA has determined that the passive restraint rule would be cost-effective—measured in dollars as well as in lives—if installation of automatic belts would increase current usage by just 13 percentage points. *See supra* p. 21. As also set forth above, NHTSA-sponsored surveys of every automatic belt system already in use in hundreds of thousands of automobiles have revealed that those devices increased usage by at least 40 percentage points—roughly three times that break-even level. *See supra* pp. 20-21. Nonetheless, NHTSA declined to apply this consistent evidence in its analysis of the rescission proposal. The reasons NHTSA gave for refusing to rely on the record evidence do not survive examination.

NHTSA's primary justification for rejecting the data was that it reflected usage rates for nondetachable belts. Most of that improved usage, the agency said, was "due to the nondetachability feature." Pet. App. 102a. The assumption is that because most people fail to buckle manual belts, they will also (if given the opportunity) unbuckle automatic belts. The validity of that assumption, however, depends upon the reason people fail to buckle their manual belts. If the reason is that they object to wearing seat belts, then the assumption may well be true. But if most people fail to buckle-up because of laziness or forgetfulness, then they can be expected to use automatic belts—even detachable ones—because, as NHTSA recognized, "automatic restraint systems eliminate the need for any action by the occupant to obtain

crash protection benefits." NHTSA FRIA at II-4 (R. 30).

In fact, NHTSA-sponsored surveys do reveal that the two most important reasons people give for not wearing manual belts are that (1) the belts take "too much time" to put on, and (2) the occupants are "too lazy" or forgetful to buckle-up. National Safety Belt Study at 7 (R. 1108).[40] Since detachable automatic belts overcome these causes and put inertia on the side of wearing belts, the assumption that detachables would do no better than manual belts is contrary to the record. Only by ignoring its own evidence as to the reasons for seat belt nonuse could the agency conclude that not even a 13 point improvement was predictable.

NHTSA offered two other justifications for rejecting the evidence on usage increases from existing automatic belts. First, although the agency believed that most (about four-fifths) of the experienced increase could be attributed to nondetachable features, it asserted that a portion of the balance of that increase was due to the demographics of owners of Rabbits and Chevettes, and to the fact that small car owners are more likely to perceive safety risks than large car owners. Pet. App. 102a, 97a-98a. This assertion is belied by the record. A NHTSA-sponsored study has shown that "[s]eat belt use is *not* a behavior which is sharply differentiated by traditional demographic and geographic characteristics of the population." National Safety Belt Study at 22 (R. 1117) (emphasis added). Moreover, any demographic skewing would affect the manual as well as automatic belt rates of the cars studied, and thus would not affect the incre-

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[40] Another NHTSA-sponsored survey found that 68% of the people polled gave as their reasons for not buckling up "bothersome, inconvenient, forgot." NHTSA FRIA at IV-25 (R. 81). When people were asked how they felt about installation of automatic seatbelts in their next car, 63% responded favorably, and fewer than one-third said that they would disconnect the belts. *Id.* at IV-37 (R. 93).

mental usage rate (*i.e.*, the difference between the automatic and manual rates). NHTSA FRIA at IV-54 (R. 110). And, even if past usage data were weighted in favor of small cars, DOT has recognized that small cars account for nearly 50% of all passenger sales and are projected to account for 90%. DOT, Motor Vehicle Safety, *supra* at 2; NHTSA Feb. RIA at IV-4. NHTSA's demographic concern was, therefore, an invalid basis for rejecting the usage data.

Second, NHTSA speculated that the remainder of the experienced usage increase in Rabbits and Chevettes was attributable to volunteerism: the owners voluntarily purchased the automatic belts and thus were more likely to use them. Pet. App. 98a, 102a-103a. The record discredits this assertion as well. Only 5% of Chevette owners and 12% of Rabbit owners requested automatic belts; many of the owners did not know that the cars contained automatic belts, and many had no choice but to accept them.[41] The agency itself recognized that "[t]he restraint system seems to play a very minor role in the purchase of a car." NHTSA FRIA at IV-34 (R. 90).

In sum, when NHTSA's claim of substantial uncertainty regarding usage rates of detachable belts is measured against the record, it is shown to be devoid of any evidentiary basis.[42] Although NHTSA could not predict the *precise* increase that would occur, no such precision

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[41] NHTSA FRIA at IV-34 to 35 (R. 90-91). *See* Automatic Safety Belt Systems Owner Usage and Attitudes, at x, 8-10 (May 1980) (R. 916, 928-30); *id.* (Feb. 1981) at xi, 14 (R. 1008, 1023).

[42] Petitioners' assertion that "the court of appeals sustained NHTSA's findings" of uncertainty as to the effectiveness of detachable belts, Brief for Federal Parties at 19 n.17, is incorrect. Based upon its review of the record, the court of appeals rejected "NHTSA's conjectural efforts to distinguish" the available usage data. The court observed that the usage studies in the record indicated that the benefits of detachable belts would exceed their costs. Pet. App. 51a-53a.

was necessary.[43] Even if the agency believed the rule had to be cost-effective to be justifiable, *but see supra* note 21, it only needed to find that the usage increase would likely equal or exceed 13 points. All the evidence in the record—both as to current automatic-belt usage, and as to the reasons for nonuse of manual belts—established that usage would increase by more than 13 points, even with detachable belts. NHTSA's speculative efforts to discredit those data are refuted by the evidence that the agency itself collected. The "substantial uncertainty" upon which NHTSA premised the rescission does not exist.

C. NHTSA's Other Objections to Detachable Belts Were Insubstantial

In addition to "uncertainty," NHTSA suggested three other reasons for not requiring the installation of detachable belts. First, NHTSA suggested that the public might regard automatic restraint requirements as "an expensive example of ineffective regulation," which might generate a public backlash against all mandatory safety measures. Pet. App. 107a-108a. This objection depends wholly upon the validity of NHTSA's assumption that automatic belts will fail to increase usage—an assumption that the record contradicts. NHTSA did not suggest that the public would object to passive restraints if they did succeed in reducing automotive death and injury, and there is no evidence of any general hostility of the public toward passive restraints. *See supra* p. 35.

NHTSA's second objection to passive restraints was philosophical: that it would be inequitable to require a person who uses manual belts to purchase automatic belts,

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[43] As Secretary Adams noted, the agency can never have that kind of certainty when promulgating a safety standard, since the purpose of the Act was to force the industry to implement technologies not yet in use, and thus lacking on-the-road experience. That was what Adams meant when he said that NHTSA must often make predictive judgments without "real world statistical proof," a point quoted out of context in MVMA's Brief, at 23 & n.39. *See* 42 Fed. Reg. at 34,292 (R. 1737).

because he would be subsidizing nonusers of manual belts without gaining additional protection himself.[44] This theoretical objection—applicable to at most 11% of the motoring public (the percentage that currently use belts)—pales in comparison to the massive social savings in avoided deaths, injuries, and economic loss that would result from implementation of the passive restraint rule. Moreover, all drivers—including current users of manual belts—would enjoy insurance-premium reductions that could exceed the cost of the new belts. 12 Bell J. Econ., *supra* at 44 (R. 731).

Finally, NHTSA indicated that it would replace the passive restraint requirement with a public-education program that encouraged people to use manual seatbelts. Pet. App. 110a-112a. Unfortunately, the record establishes that every public education effort undertaken by NHTSA has failed to increase seat belt usage rates significantly.[45] Indeed, because of that dismal record, Congress, in passing the current DOT appropriations act, barred the agency from proceeding with its proposed educational program until it receives Congressional approval. H.R. Conf. Rep. No. 960, 97th Cong., 2d Sess. 13 (Dec. 13, 1982). The Conference Committee stated:[46]

> "Over the past decade, NHTSA has undertaken numerous efforts at significant cost to promote safety

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[44] Pet. App. 109a. Of course, this objection is equally true of manual belts: Standard 208 requires all persons to buy manual belts, even though 89% of the population does not use them at any given time. Yet NHTSA has never characterized that as an "inequitable subsidization" of the 11% minority.

[45] *See* Nordhaus Comment, App. C (R. 543-44); Comments of the Insurance Institute for Highway Safety, App. A (May 1981) (R. 454-56). Even if an education campaign worked, it would similarly increase the usage rates for passive restraints, thus maintaining their incremental advantage over manual belts.

[46] The Committee also referred to a draft report by the General Accounting Office that found that NHTSA had never determined that the educational program would be cost-effective. *Id.*

> belt usage. These efforts have had no lasting effect. . . . Although NHTSA contends that its new program is significantly different from past programs, the conferees have been presented with little evidence to support claims that it will have any better long-term results than past efforts." *Id.* at 12.

* * *

In sum, even assuming that the automakers would have complied with the passive restraint standard by using detachable belts, NHTSA's concerns about those belts did not justify rescission. The record established that the benefits of such belts would outweigh their minimal costs.[47]

IV. THE COURT OF APPEALS PROPERLY VACATED AND REMANDED THE RESCISSION, STAYING THE EFFECTIVENESS OF THE UNDERLYING RULE TO ENABLE THE AUTOMAKERS TO COMPLY

Having correctly determined that NHTSA's rescission of the passive restraint rule was arbitrary and capricious, the court of appeals did three things: it vacated the

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[47] Petitioner Pacific Legal Foundation also relies upon a "libertarian" argument that was not advanced by NHTSA: that people who prefer passive restraints should be allowed to buy them, but that people who oppose the restraints should not be forced to use them. PLF Br. at 5. Yet, as a practical matter, passive restraints simply are not available for those who want to buy them; absent a federal requirement, only one manufacturer (Mercedes) has indicated it will offer airbags, and automatic belts are available on only a few models.

The best answer to this libertarian argument, however, comes from one of its former adherents, columnist George F. Will:

> ". . . I regret[] having once argued that government has no business requiring drivers to buy and use inexpensive devices that might save them from self-destruction. There is a pitiless abstractness, and disrespect for life, in such dogmatic respect for the right of consenting adults to behave in ways disastrous to themselves. Besides, too many children passengers are sacrificed on that altar. And a large part of the bill for the irrationality of individual drivers is paid by society." *Driving Without Restraint*, Wash. Post, April 14, 1977, at A19.

rescission and remanded the matter to the agency; it temporarily stayed the effectiveness of the underlying rule in order to enable the automakers to comply; and it left the agency free to conduct further rulemaking. The court of appeals thereby provided an appropriate remedy for NHTSA's unlawful action, without intruding into the agency's internal processes.

This Court has held that "[i]f the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.'" *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), *quoting Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). That is precisely what the court of appeals did here. In its judgment order, the court vacated the rescission and remanded the case to NHTSA. Pet. App. 161a. The court did *not* order that the passive restraint rule must take effect—an action that would have precluded NHTSA from further rulemaking on the matter. On the contrary, the court of appeals stated that NHTSA remained free to modify, suspend, or rescind the rule. Pet. App. 74a.

The court of appeals also offered NHTSA another opportunity to "fin[d] nonarbitrary reasons for rescinding the standard." *Id.* NHTSA sought to exploit that opportunity, however, to gain further delay: it proposed reopening the rulemaking proceedings and undertaking "fact gathering . . . which would take one or more years to complete." Pet. App. 133a. To avoid being drawn into this "open-ended DOT decisionmaking," the court of appeals on August 4 made clear that it would simply vacate and remand the case; the agency could thereafter proceed with whatever rulemaking it wished, including modification or rescission, at whatever pace it desired. Pet. App. 82a.

As the court of appeals explained, however, the effect of vacating NHTSA's rescission "was to restore Standard

208 to the status quo ante litem," *i.e.*, the unrescinded rule remained in effect. Pet. App. 81a. That conclusion regarding the effect of vacating an agency's attempted revocation of a rule is the same one recently reached both by the Third Circuit in *NRDC* v. *EPA*, 683 F.2d at 767-69, and by Judge Wilkey for the District of Columbia Circuit in *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 479 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3099 (Aug. 8, 1982) (No. 82-177).

But Standard 208, as it stood prior to the rescission, required automakers to install passive restraints in large and mid-sized cars by September 1, 1982—a deadline less than one month away when the court issued its mandate. Because the automakers had dismantled their passive restraint programs within hours after NHTSA's rescission order was announced, the court of appeals recognized that the manufacturers could not possibly comply with the passive restraint requirement by the September 1 deadline. The court therefore exercised its equity powers to stay the compliance date for another year—in effect granting a stay of its own order vacating the rescission. At the same time, the court solicited NHTSA's advice as to whether that stay was sufficient to enable the automakers to comply. Pet. App. 81a-82a. But the court also made it clear to the agency that it remained free at any time to take action of its own aimed at modifying the standard or overturning it altogether. *Id.*

The court of appeals clearly had the authority to issue that temporary stay. Judge Wilkey recently issued just such a stay of a preexisting rule after holding that FERC's attempted revocation of the rule was invalid. *Consumer Energy Council*, 673 F.2d at 479. As the MVMA points out, a stay of the passive restraint rule was also issued by the Sixth Circuit in the *Chrysler* case, in order to give the agency time to correct the difficulties with the test dummy. MVMA Pet. at 27 n.54; *see* 472 F.2d at 681. *Cf. Mobay Chemical Corp.* v. *Gorsuch*, 682 F.2d 419, 427 (3d Cir.) (delaying reversal of pesticide

regulations for six months to enable agency to promulgate them properly), *cert. denied*, 103 S. Ct. 343 (1982). This Court has on several occasions effectively done the same thing, staying the effect of its own decisions invalidating statutes so as to provide Congress with time to respond. *See, e.g., Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 (1982); *Buckley* v. *Valeo*, 424 U.S. 1, 142-43 (1976). All of these actions are no more than specific applications of the general principle that a reviewing court has the equitable authority to tailor its relief to the practical exigencies of the case. *See, e.g., Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939); *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579, 590 (5th Cir. 1981).[48]

Petitioners' argument that the court below somehow violated this Court's decision in *Vermont Yankee* ignores what the court of appeals actually did. Unlike the situation in *Vermont Yankee*, the court here did *not* dictate "the methods, procedures, and time dimension" to be followed by the agency on remand. 435 U.S. at 545. On the contrary, the court did not order NHTSA to do *anything* on remand; it expressly left the agency free to proceed in whatever manner, and at whatever pace, it preferred. Pet. App. 82a.[49]

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[48] To be sure, the Secretary of DOT also has the power under 15 U.S.C. § 1392(c), (e) to delay the effective date of a safety standard, but there is nothing in the Safety Act suggesting that this provision was intended to deprive the courts of their historic equity powers. *See* 15 U.S.C. § 1394(a)(6); *cf.* 28 U.S.C. § 1651 (All Writs Act).

[49] Thus, the court below did not, as MVMA implies, "reinstate" a regulation that was "unlawfully modified." MVMA Brief at 47. In any event, a court does have the power to require an agency to take action when the agency's decision not to act is unlawful. *E.g., Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*) (requiring HEW to commence enforcement proceedings).

The various ICC Act cases cited by MVMA for the proposition that a court may not reinstate a rule are not applicable to this case.

Petitioners' claim that the court of appeals invaded NHTSA's primary jurisdiction is also without merit. That doctrine reserves to an agency the *initial* determination of matters within the scope of its statutory authority; but it does not exempt those determinations from subsequent judicial review. Here, NHTSA *did* determine, in the first instance, whether the passive restraint rule should be continued or rescinded. The court of appeals' order vacating that determination did not intrude upon NHTSA's primary jurisdiction in any way.

The primary jurisdiction doctrine is equally inapplicable to the court's subsequent order staying the effect of its decision until September 1983. That stay was an exercise of the court's own equity powers, not an exercise of agency rulemaking authority. As the court explained, its decision did not foreclose the agency from issuing further orders modifying the rule. Pet. App. 82a. Nothing the court did abridged the agency's authority to postpone the compliance deadline on its own.

Moreover, even as to its own stay, the court did not consider the relevant evidence "in the first instance." MVMA Brief at 48 n.94. Rather, it asked DOT to advise it as to what "compliance dates are achievable." Pet. App. 81a. The automakers submitted their evidence to the agency, and the agency in turn presented its views to the

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They are based on peculiarities of that statute's language, legislative history, and structure "that evidenc[e] a clear purpose" to oust the "equitable power" that a court would otherwise have. *Long Island R.R.* v. *Aberdeen & Rockfish R.R.*, 439 U.S. 1, 7 (1978). *See Burlington Northern, Inc.* v. *United States*, 51 U.S.L.W. 4029, 4031 (U.S. Dec. 13, 1982). No such evidence exists with respect to the Safety Act. Those cases also involved injunctions issued directly against the regulated parties, *i.e.*, the railroads, and not just against the regulatory agency. *See Atchison, T. & S.F.R.R.* v. *Wichita Bd. of Trade*, 412 U.S. at 818-19. Nothing like that occurred in this case.

court. App. to MVMA Brief at 38.[50] Nothing about that procedure, or any other aspect of the court's disposition of the case, violated *Vermont Yankee*.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

Of Counsel:
DONALD P. MCHUGH
Vice President and
General Counsel
State Farm Mutual
Automobile Insurance Co.

* *Counsel of Record*

JAMES F. FITZPATRICK *
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724

Attorneys for Respondents State Farm Mutual Automobile Insurance Company, et al.

February 7, 1983

[50] Because the preexisting compliance deadline was only a month away, the court necessarily had to issue at least an interim stay before receiving DOT's submission. However, it expressly asked the agency to advise it as to whether a further stay would be necessary. Pet. App. 81a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

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Respondents

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners

v.

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Respondents

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
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v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

APPENDIX TO BRIEF OF RESPONDENTS STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*

Of Counsel:
DONALD P. MCHUGH
Vice President and
General Counsel
State Farm Mutual
Automobile Insurance Co.

* *Counsel of Record*

JAMES F. FITZPATRICK *
MICHAEL N. SOHN
JOHN M. QUINN
MERRICK B. GARLAND
BORIS FELDMAN
ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724

Attorneys for Respondents State Farm Mutual Automobile Insurance Company, et al.

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EXCERPTED PHOTOGRAPHS FROM FILM, "CRASHES THAT NEED NOT KILL"

The following sequence of photographs is excerpted from the Insurance Institute for Highway Safety film, "Crashes That Need Not Kill," which has been lodged with the Clerk of this Court. The Institute submitted the film to the passive restraint rulemaking record on August 2, 1976, in conjunction with Secretary Coleman's deliberations (OST Docket No. 44, Notice 76-8).

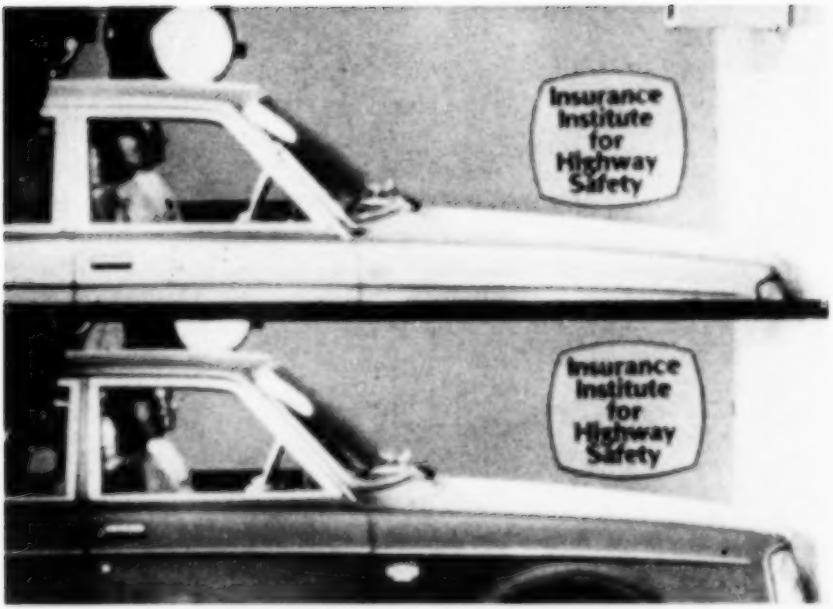
The first four photographs compare the effect of a collision on occupants in cars *with* airbags and *without* airbags. The cars are 1975 Oldsmobile Ninety-Eight sedans that were crashed into test barriers. As the film explains, none of the test dummies was wearing a seatbelt. The first car, which was not equipped with airbags, was crashed at 35 miles per hour. The second car, which was equipped with airbags, was crashed at 37 miles per hour.

The last eight photographs show, in a split-screen comparison, the results of two crash tests carried out by the Institute in 1976. As the film explains, in one test (top portion of split-screen photos), a 1975 Volvo sedan equipped with full front-seat airbags and occupant test dummies was crashed into a rigid barrier at 36 miles per hour. In the other test (bottom portion of photos), an identical 1975 Volvo not equipped with airbags was crashed into the barrier at 35 miles per hour.

The photographs from the film are in sequence—from the cars' first contact with the test barrier, through the deployment of the airbag in the top car, and through the completion of the occupants' forward movement into, respectively, either the cushioning airbag or, in the case of the unrestrained occupants, the steering column and windshield.

2a

5a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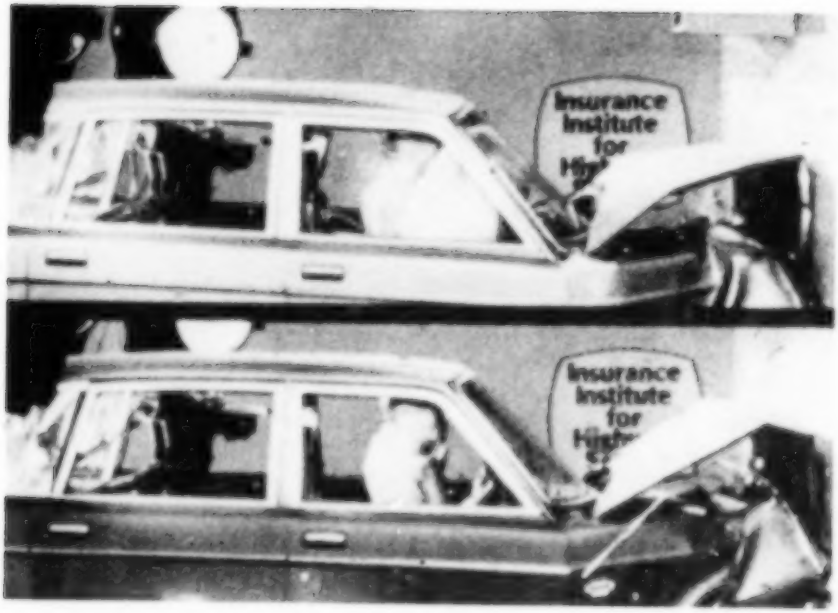
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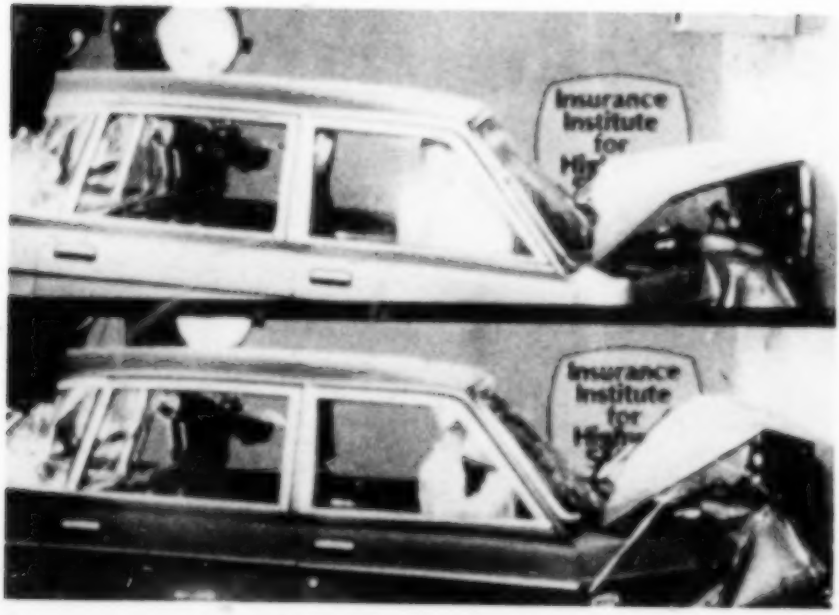
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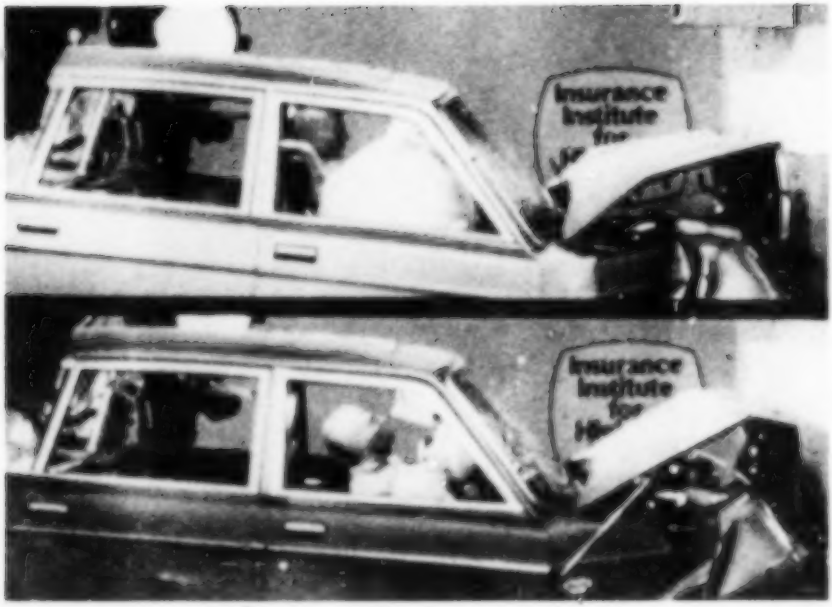
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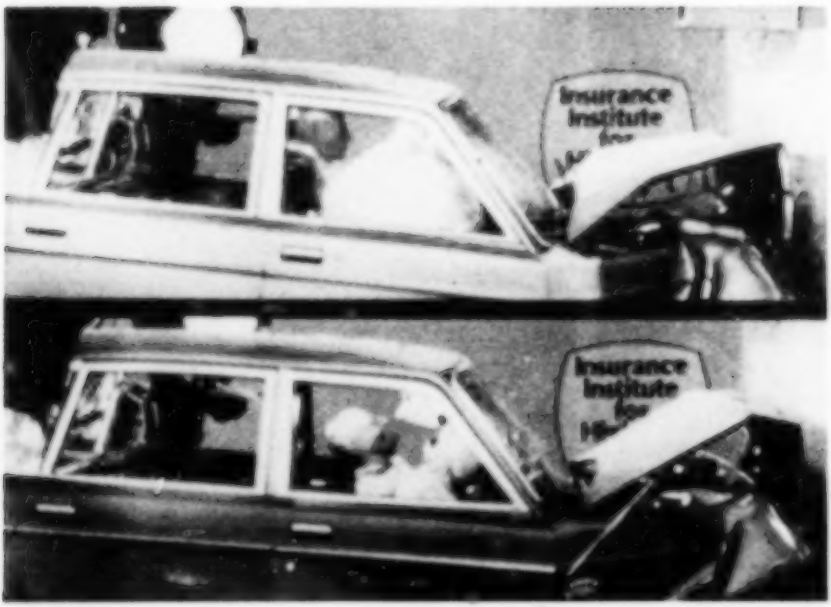
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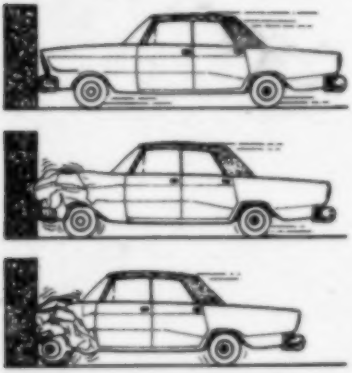
What Happens in a Collision

1st, The Car Collision

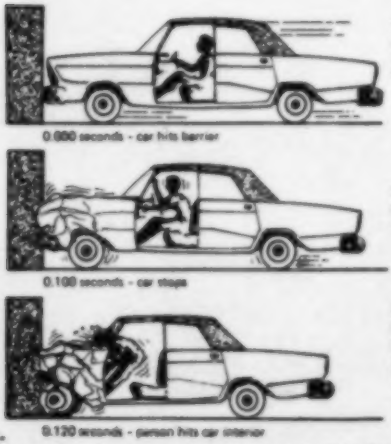


When a car hits a solid barrier, it doesn't stop all at once. The bumper stops immediately, but the rest of the car continues to move forward.

The car slows down as the crushing of the front end absorbs some of the force of the collision.

At 30 mph, the car takes about 1/10 of a second to come to a complete stop. The front end is crushed, but the passenger compartment usually remains undamaged.

2nd, The Human Collision



0.000 seconds - car hits barrier

0.100 seconds - car stops

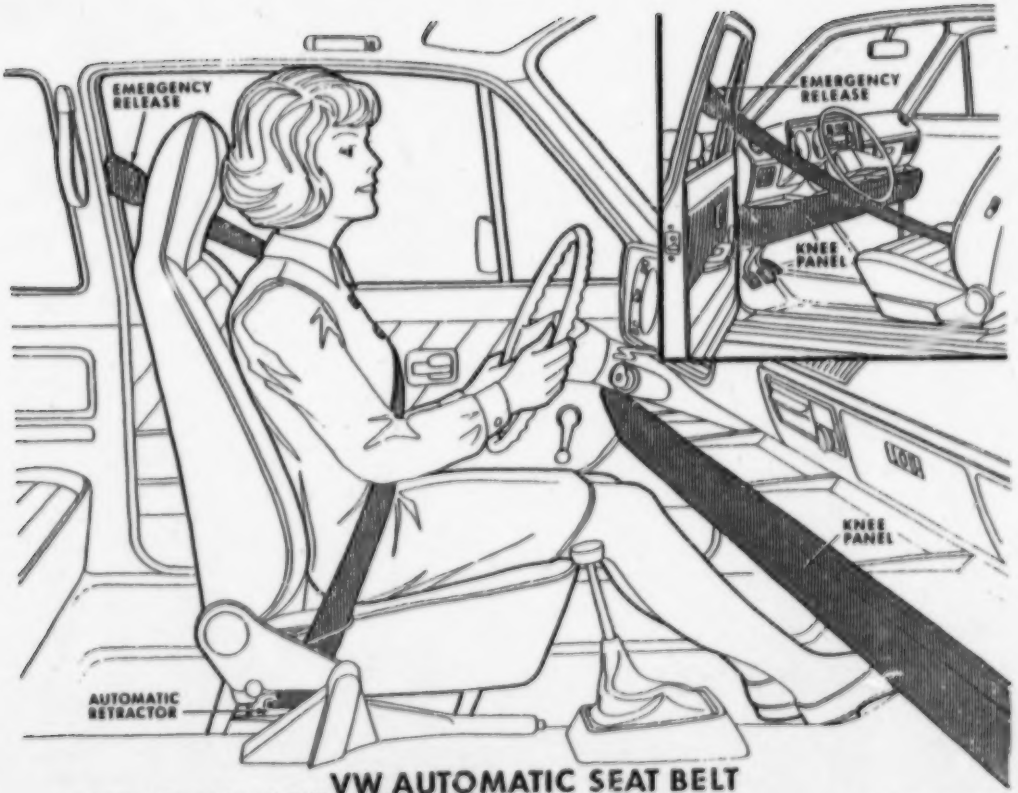
0.120 seconds - person hits car interior

On impact, the car begins to crush and to slow down. The person inside the car has nothing to slow him down, so he continues to move forward inside the car at 30 mph.

Within 1/10 of a second, the car has come to a complete stop, but the person is still moving forward at 30 mph.

One-fiftieth of a second after the car has stopped, the person slams into the dashboard and windshield. This is the human collision. The car takes 1/10 of a second to stop, the human takes only 1/100 of a second.

Source: NHTSA, Automobile Occupant Crash Protection, Progress Report No. 3, July 1980 at 14.



VW AUTOMATIC SEAT BELT

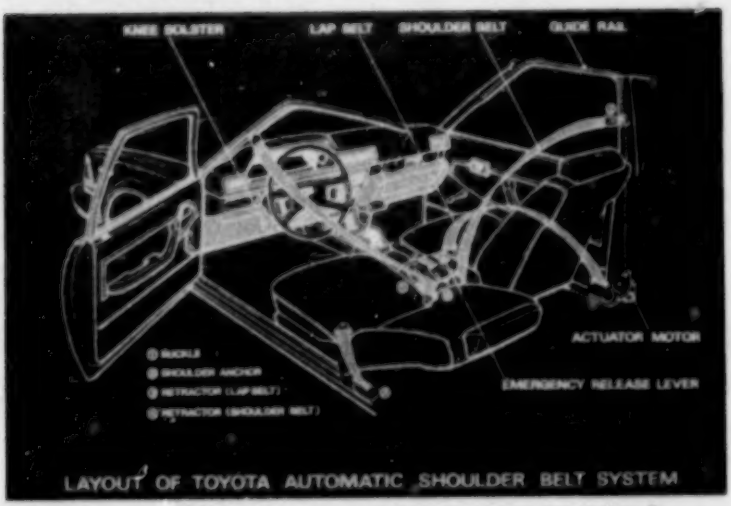
Source: Comments of Volkswagen of America, Inc., April 14, 1977 (74-14-N07-075)

VW 3183-75

Figure III-D **Toyota Automatic Safety Belt**

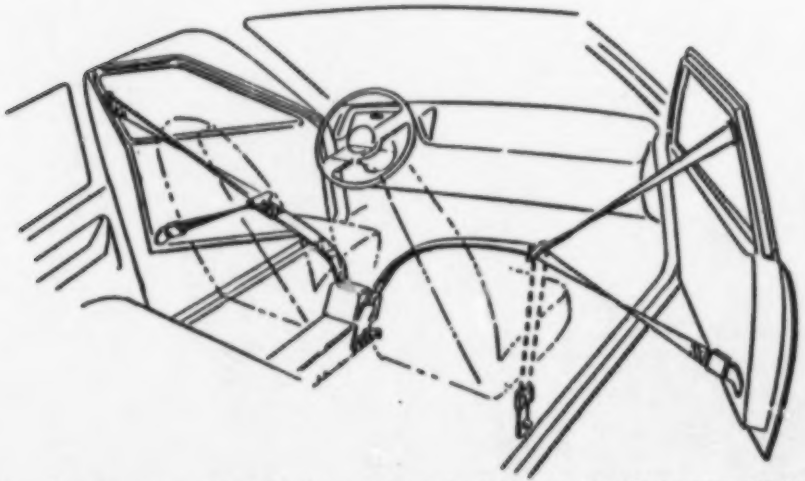
Entering

Seated



Source: NHTSA Occupant Crash Protection, Progress Report No. 3, July, 1980, at 28.

1980 Chevette Three Point Automatic Lap/Shoulder Belt
(Non - Separable)



Source: Comments of General Motors, March 16, 1981, at 10a (74-14-NPRM-W20-109)

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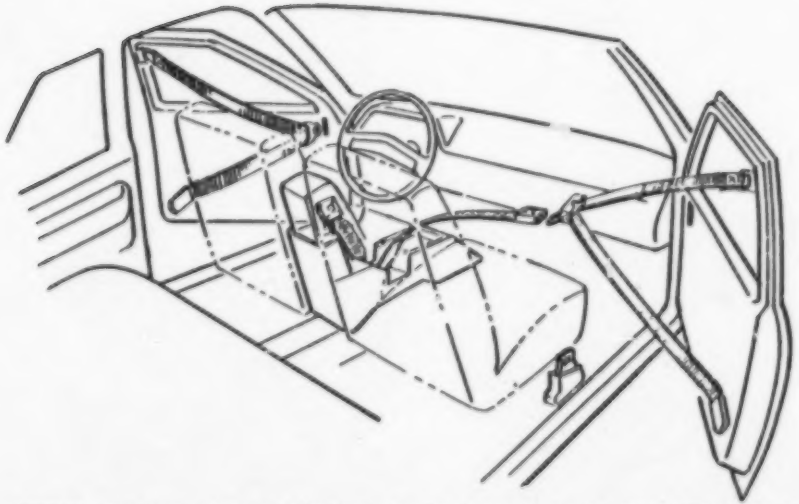
THREE POINT AUTOMATIC BELT
(Separable)



Source: Comments of General Motors, March 16, 1981, at 9a (74-14-NPRM-N20-109)

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Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.* and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
JERRY W. COX

ZUCKERT, SCOUTT, RASENBERGER
& DELANEY
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Counsel for Respondents
National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung

**Counsel of Record*

Of Counsel:
LOWELL R. BECK, President
National Association of
Independent Insurers

DONALD L. SCHAFFER, Senior
Vice President, Secretary
& General Counsel
Allstate Insurance Companies

February 7, 1983

QUESTION PRESENTED

Whether in light of all the facts and circumstances it was arbitrary and capricious and contrary to law for the National Highway Traffic Safety Administration to decide that a particular type of passive seat belt proposed to be used by certain manufacturers would be too ineffective to warrant its use and that accordingly the entire passive restraint safety standard, covering air bags and other types of seat belts of proven effectiveness, should be rescinded?

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35 Fed. Reg. 16927 (1970)	45
40 Fed. Reg. 33977 (1975)	45
43 Fed. Reg. 52493 (1978)	25
43 Fed. Reg. 52494 (1978)	25
MISCELLANEOUS	
R. Arnould and H. Grabowski, "Auto Safety Regulation: An Analysis of Market Failure," 12 *Bell Journal of Economics* (Spring 1981)	35
National Safety Council, Accident Facts: 1982 Edition (1982)	2,3
Office of Technology Assessment, U.S. Congress, Technology and Handicapped People, Background Paper #1: Mandatory Passive Restraint Systems In Automobiles: Issues and Evidence (Sept. 1982)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-354, 82-355 and 82-398

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.* and CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION and UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.* and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

STATEMENT

This case concerns the rescission of a safety regulation that would have required the installation of automatic crash protection devices in newly manufactured automobiles beginning on September 1, 1982. The long history of automatic crash protec-

tion before the agency, the Congress and the courts is set forth in the court of appeals opinion and the petitioners' briefs. Any such history, however, assumes a familiarity with certain basic facts that may not be obvious from the complex record. NAII[1] will limit this statement to those facts.[2]

1. The enactment of the National Traffic and Motor Vehicle Safety Act, *as amended*, 15 U.S.C. §§ 1381, 1391-92, 1394-1403, 1405-26, 1431 (1976 & Supp. V, 1981) [hereinafter cited as Safety Act] in 1966 was meant to be the single most important step ever taken by the federal government to protect the public health and safety. Technological developments are often a mixed blessing, but never so much as with the motor vehicle, a device that gave Americans an unprecedented freedom to travel but that had emerged by 1929 as the leading cause of accidental deaths and injuries in the United States.[3]

The Safety Act has yet to fulfill its promise. Certainly, some progress has been made. Motor vehicle death rates, in

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[1] "NAII" refers, collectively, to respondents National Association of Independent Insurers, Automobile Owners Action Council and Eugene J. Meyung. The member companies of the Association are identified in the appendix to NAII's brief in opposition to the petitions for certiorari. Other parties to this matter are identified as follows: petitioners United States Department of Transportation *et al.* (hereinafter "DOT"); petitioners Motor Vehicle Manufacturers Association of the United States, Inc. *et al.* (hereinafter "MVMA"); petitioners Consumer Alert *et al.* (hereinafter "Consumer Alert"); and respondents State Farm Mutual Automobile Insurance Co. *et al.* (hereinafter "State Farm"). The National Highway Traffic Safety Administration (hereinafter "NHTSA") was the agency below.

[2] Citations to the record will, where applicable, follow the format used in the DOT Brief: material in the Joint Appendix in the court of appeals will be cited as "C.A. App. _____"; and material in the appendix to the petition for a writ of certiorari filed in No. 82-354 will be cited as "Pet. App. _____" Material in the appendix to this Brief will be cited as "App. _____."

[3] *See National Safety Council, Accident Facts: 1982 Edition* 13 (1982) [hereinafter cited as *Accident Facts*].

comparison to number of motor vehicles, vehicle miles driven and total population, have decreased since 1966, but it is difficult to disaggregate the beneficial impact of the Safety Act from other, unrelated developments such as improved highways and the national 55 mph speed limit.[4] Moreover, there has been little progress in absolute terms. In 1966, 53,000 Americans died in motor vehicle accidents; in 1980 the figure was 52,600 deaths.[5] NHTSA estimates that these numbers will be even higher in future years because of the growing number of small cars on the road, with an additional 7,000 passenger car occupant deaths yearly by 1990. C.A. App. 263.

This impersonal calculus cannot begin to describe the magnitude of the human tragedy. For example, the chances are one in one hundred that a fifteen year old boy will die in an automobile accident before his twenty-fifth birthday, a death rate twenty times higher than that produced by the polio epidemic at its worst.[6] For every front seat occupant killed in a motor vehicle accident, there are over fifteen serious injuries. C.A. App. 73.

2. The primary failure of the Safety Act has been in the area of second collisions. The "second collision" is the collision between the vehicle occupant and the interior of the vehicle, and it is the major cause of motor vehicle accident deaths and injuries.[7] There are two ways to address this problem. The first is to reduce the severity of second collisions that otherwise occur, an approach that NHTSA followed by mandating interior design changes such as padded surfaces (Standard 201), head restraints (Standard 202) and collapsible steering columns (Standard 203). But the second and by far the most

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[4] *See Office of Technology Assessment, U.S. Congress, Technology and Handicapped People, Background Paper #1: Mandatory Passive Restraint Systems In Automobiles: Issues and Evidence,* 8-9 (September, 1982) [hereinafter cited as *OTA Background Paper*].

[5] *Accident Facts,* at 59.

[6] *OTA Background Paper,* at 7.

[7] In 1980, 25,200 front seat passenger car occupants died in accidents. C.A. App. 60. Nearly all died from hitting the interior of the car or from ejection onto the pavement—the type of occurrences seat belts are designed to prevent.

significant approach is to reduce the frequency of second collisions by holding the passenger in place when an accident occurs, or, as the Sixth Circuit once succinctly put it, "to assure that when the car stops dead, the passengers don't." *Chrysler Corporation v. Department of Transportation*, 472 F.2d 659, 663 (6th Cir. 1972).

The manual seat belt was the first method chosen to provide such protection, but it took only a few years of experience to demonstrate its inherent flaw—by requiring an affirmative action of the passenger to be effective, it would never be widely used. Over the years, usage rates for manual belts have declined to the point where they presently provide crash protection for only 11% of automobile occupants. For this reason, there has been a consensus of expert opinion for over a decade that the only way to address effectively the second collision problem is through automatic or "passive" devices, devices that require, in the words of Standard 208, "no action by vehicle occupants" to be effective. Two types of automatic crash protection devices have come to the forefront: automatic seat belts and air bags.

3. In the early 1970's, designers recognized that by fastening the outboard ends of a seat belt to the interior of the door, and not the frame of the vehicle, the belt could remain attached without impeding entry or exit from the vehicle; *i.e.*, the belt would deploy automatically without any action on the part of the passenger. Assuming that it could also pass the required dynamic crash tests,[8] it would qualify as a Standard 208 passive restraint. Approximately 400,000 vehicles were sold in this country in the period 1975-1981 with automatic belt systems that met the passive restraint standard. Pet. App. 18a-19a, n. 12. Two principal systems and the GM "detachable" belt are illustrated and described in the appendix to this Brief. App. 1a-3a, (Figures 1-3).

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[8] Under the pre-rescission Standard 208, a passive restraint device was required to demonstrate survivability in 30 mph front and 20 mph lateral barrier crashes with anthropomorphic test dummies in the passenger positions. 49 C.F.R. § 571.208-S5, 571.208-S6. Manual belt systems are not subject to these requirements.

When automatic belt systems of any type are available and used, they prove to be very effective safety devices. In its Regulatory Impact Analysis in the agency docket below, NHTSA found that "there is no *a priori* reason that automatic belts cannot perform as well or better than manual belts when they are used." C.A. App. 65. For the user of an automatic belt who has an accident, this translates into a 50% reduction in the probability that it would be fatal and a 65% reduction in the probability that it would cause a serious injury. *Id.*

4. An air bag is the most readily understandable form of automatic crash protection. Completely concealed in the dashboard and steering column, it automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The entire sequence takes only a few tenths of a second.[9]

On-the-road experience with approximately 13,000 air bag-equipped vehicles produced in the mid-1970's and over 2,000 crash tests (including 188 with human volunteers), led NHTSA to conclude in 1977 that air bag systems were extremely effective in preventing deaths and reducing injuries, a conclusion that was upheld in *Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, 1344-45 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). NHTSA reaffirmed that conclusion in its Regulatory Impact Analysis below: "[t]he Agency has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use, such that it could be considered an acceptable method of compliance with the mandates of the Act." C.A. App. 264. In practical terms, this effectiveness translates into a 40-66% reduction in the probability of a fatal injury, and a 54% reduction in the probability of a serious

[9] NHTSA incorporated into the agency record a short motion picture entitled "Reliable Air Bags." (Exhibit N-22-092). This film explains how air bags work and includes footage of actual crashes with air bag-equipped vehicles. It was viewed by the NHTSA Administrator and staff and was lodged with the court of appeals.

injury, in the event of an accident involving an air bag-equipped vehicle. C.A. App. 65-66.

5. As late as 1980, most manufacturers, facing an initial compliance date of September 1, 1981, intended to provide automatic crash protection with a mix of these automatic belt and air bag systems. C.A. App. 1634-35. In early 1981, NHTSA again solicited the views of the manufacturers, and GM announced that it had cancelled all prior plans and now intended to comply with the "detachable" automatic belt, C.A. App. 1433, a design that basically consisted of moving the emergency release buckle on the 1980 Chevette system approximately 18 to 24 inches to the point where the lap and shoulder belts converge. (Compare Figures 2 and 3, App. 2a, 3a). GM actually installed such a belt on only eighty-seven 1981 Cadillac Sedan De Villes. C.A. App. 104. In the course of the rulemaking proceeding that summer, GM and Chrysler indicated an intention to use detachable belts if required to provide passive restraints; Toyota, Mazda and Subaru indicated "expectations" of using detachable belts; and Ford, Volvo, Renault, Aston Martin and Rolls Royce "expected that the majority of automatic belts would be fully-detachable, without stating their own design plans."[10] Other manufacturers said nothing. On the basis of these representations, NHTSA found in Notice 25 that "most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts." Pet. App. 92a.

6. The most useful summary of the current status of passive restraint systems was compiled not by NHTSA but by the court of appeals in the context of the disputes over the stay of Notice 25 (the rescission order) and over the stay of the Standard 208 compliance dates. One fact is clear from that record: absent a passive restraint *requirement*, automatic crash protection is *not* going to be widely available to the public in

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[10] Brief for Respondents at 32, *State Farm Mutual Automobile Insurance Co. v. Department of Transp.* 680 F.2d 206 (D.C. Cir. 1982).

the foreseeable future, *i.e.*, consumers will *not* be free to choose fully effective automatic crash protection as an option.[11]

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no disagreement among the parties that the function of a court in determining whether agency action is "arbitrary or capricious" is as set forth in the *Overton Park* and *Bowman Transportation* decisions. Petitioners claim, however,

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[11] a. The first passive restraint compliance date under the pre-rescission Standard 208 was September 1, 1982 for large and medium-size cars. NHTSA found that most manufacturers intended to comply with automatic belt systems. Notice 25 resulted in an abrupt cancellation of all plans for new automatic belt systems. The manufacturers' commitment not to produce these systems was extensive and included the immediate abandonment of the substantial capital expenditures that had already been made. As of today, automatic belt systems are available as options only on the VW Rabbit/Jetta and the Toyota Cressida, and both manufacturers have cancelled their plans for such systems on other models. No other manufacturers have indicated plans for automatic belt systems absent a passive restraint requirement. *See State Farm Mutual Automobile Insurance Co. v. Department of Transp.*, NHTSA Memorandum In Response to the Court's Aug. 4, 1982 Order (Volkswagen letter, Sept. 1, 1982; Toyota letter, Sept. 15, 1982).

b. In 1979-80, GM, Mercedes-Benz and Volvo announced plans for some production of air bag-equipped vehicles, C.A. App. 1477-79, but those plans were subsequently cancelled. No manufacturer has indicated current production plans for a fully effective air bag system absent a passive restraint requirement. NHTSA Memorandum In Response, *supra*.

c. As indicated in the DOT Brief, at 12, n.12, NHTSA has, in recent months, proposed state police and GSA demonstration projects for air bags. According to recent press reports, however, "most of the major domestic automakers interviewed yesterday say they aren't planning to take up the NHTSA offer." *Washington Post*, January 8, 1983, at D9.

d. On January 28, 1983, Mercedes-Benz advised NHTSA that beginning with model year 1984, it will offer a Supplemental Restraint System ("SRS") as an option on some models exported to the U.S. The SRS is a driver-side only inflatable device that does not meet the Standard 208 requirements for automatic crash protection. It is useful, as the name implies, only as a supplement to a seat belt, *i.e.*, "its effectiveness depends on whether or not the active seat belt is in use." *Tax Credits for Installation of Airbags in Automobiles, Hearings Before The Subcommittee on Taxation and Debt Management of the Committee on Finance*, 97th Cong., 2d Sess. 265 (Jan. 28 and March 2, 1982) (letter from Mercedes-Benz to Sen. Danforth, March 3, 1982).

that the court of appeals went beyond its proper role when it refused to defer to the agency's assertions of "substantial uncertainty" about future benefits as an adequate basis for rescinding the automatic crash protection requirement. This, according to petitioners, raises issues of weighty consequence for all administrative action looking toward reducing regulation.

The petitioners are wrong. The arbitrary and capricious standard has meaning only in the context of a particular statute and a particular record. A naked assertion of "uncertainty" as to benefits may be a sufficient basis to rescind a regulation or to refuse to issue one in the first instance where the statute grants broad discretion as to policy and action, where there is a nominal record, or where the agency action does not constitute a sharp departure from a settled course. In *this* case, none of these factors exist.

The Safety Act represents a deliberate choice by Congress to require the imposition of safety standards and force the improvement of safety technology. The record shows over a decade of progress by the agency toward that purpose including the development of new and effective automatic crash protection technology. It then shows, in the order under review, a complete reversal of course. Under these circumstances the agency had an obligation, imposed not by the court but by its own change of direction, to show a rational connection between the record, the statute, and a decision which, by terminating the automatic crash protection requirement and eliminating the safety technology it had engendered, appeared to be contrary to both.

NHTSA made no such showing. Indeed, its decision displays on almost every page a failure to consider relevant factors rationally, factors such as: (1) the effect on usage rates of the automatic feature (as distinguished from the detachability feature) of the proposed automatic seat belts; (2) the effect on usage rates of a warning system NHTSA had prescribed for the purpose of increasing usage; (3) the effect of market forces and product liability considerations on passive restraint design if the standard were not rescinded; and (4) the effect of revising

the standard to require current and practical use-inducing technology.

The decision reflects an equal disdain for the statutory purpose. The Safety Act calls for consideration of costs but in a context where safety is the "overriding" consideration. Even NHTSA's flawed consideration of usage rates showed a potential for lives saved numbered in thousands and serious injuries avoided in tens of thousands. NHTSA found this unimpressive and instead made cost the overriding consideration—a cost ($75 per new car plus $14 for fuel) which it acknowledged would probably be too small to be noticed by consumers, which it acknowledged could be entirely eliminated by savings in insurance premiums, and which its own calculations showed would be largely offset by savings to society from reduced deaths and injuries.

The Safety Act was adopted because Congress found that voluntary safety programs, and industry safety initiatives, were not working. NHTSA's decision dropped a mandatory safety standard in favor of a voluntary educational program on the basis of the industry's "plans." In the process it abandoned the highly effective automatic crash protection technology which had been developed earlier in response to that standard.

ARGUMENT

The "arbitrary and capricious" standard under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), requires "a thorough probing, in-depth review" of the agency action, the facts and the underlying statutory authority of the agency. *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). *See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). The purpose and effect of the Safety Act are discussed in the first section of this argument. In the second section, the rescission order is measured against the Safety Act and the detailed record, with the conclusion that there are four reasons why it was unlawfully issued. The final section deals with petitioners' contentions about the court of appeals opinion.

I. THE SAFETY ACT REQUIRES NHTSA TO FORCE THE DEVELOPMENT AND APPLICATION OF NEW TECHNOLOGY TO REDUCE "SECOND COLLISION" DEATHS AND INJURIES.

The plain meaning as well as the legislative history of the Safety Act indicate that NHTSA is *required* to force the development and application of new technology to reduce the death and injuries resulting from second collisions. It is a statute that does not permit much enforcement discretion on the part of the agency or contemplate significant voluntarism on the part of the regulated industry. To the extent that it requires enforcement efforts to be reasonable and practicable, it nevertheless recognizes that safety is the paramount consideration.

A. Congress Selected A Forceful Regulatory Strategy Rather Than Strategies That Would Have Relied Upon Voluntary Efforts And Industry Initiative.

The basic statutory scheme is mandatory rather than precatory.[12] NHTSA has a mandate to issue safety standards

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[12] The stated purpose of the Safety Act is to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." The issuance of motor vehicle safety standards, which the Secretary of Transportation "*shall* establish by order," is the primary means of regulation. Such standards must be "practicable," must "meet the need for motor vehicle safety" and must be stated in objective terms. 15 U.S.C. § 1392(a) (emphasis added). "Motor vehicle safety" is defined as protection against "unreasonable risk of accidents" and "unreasonable risk of death or injury to persons in the event accidents do occur," 15 U.S.C. § 1391(1), reflecting the emphasis on both accidents and second collisions. In fixing standards the Secretary is directed to consider various factors, including whether the standard will "contribute to carrying out the purposes of this Act" and whether it will be "reasonable, practicable and appropriate for the particular type of motor vehicle." 15 U.S.C. § 1392(f).

Once a safety standard is established by order, it must become effective within 180 days to one year unless the Secretary can demonstrate that an earlier or later date is in the public interest. 15 U.S.C. § 1392(c). Manufacturers self-certify their compliance, and NHTSA's remedies against a failure to certify, false certification or subsequent noncompliance include civil penalties, 15 U.S.C. § 1398, injunctive relief, 15 U.S.C. § 1399, and repurchase/recall orders. 15 U.S.C. § 1414. General exemptions from safety standards are available only in circumstances in which the exemption would produce an equivalent or higher level of safety; and "economic hardship" exemptions are available only to manufacturers producing 10,000 or fewer vehicles in a year. 15 U.S.C. § 1410.

that effectively address the second collision problem, and those standards are to be pushed beyond the limits of existing technology to the extent practicable. That mandate represents a clear determination by Congress to have the Federal government play an active, aggressive role in advancing the cause of motor vehicle safety, a decision to propel, not merely lead, the auto industry toward increased safety. This purpose is also confirmed by the legislative history, a history which reveals that Congress specifically rejected the regulatory strategy that NHTSA is now intent on following.

Prior to 1960 Congress had shown interest in auto safety but had done little about it. Three pieces of safety legislation had been enacted[13] but, in general, Congress had allowed the auto industry to take the lead. The industry had engineered safety improvements in brakes, lights and suspension systems,[14] but no serious inroads had been made on the enormous toll of death and injury. When Congress began to consider the safety issue in earnest in the second session of the 89th Congress, this failure of previous safety efforts, and the human and economic cost of that failure, became a recurrent theme: 50,000 Americans were being killed in auto accidents each year, and 1,800,000 injured; this "grim toll" and its cost to society—exceeded only by major wars and diseases—had to be stopped!

Three different regulatory strategies were considered by the 89th Congress. First, the Administration bill (H.R. 13228 and S. 3005, 89th Cong., 2d Sess. (1966)) would have given the Executive Branch broad authority to require that safety be addressed by manufacturers, but made the exercise of that

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[13] This earlier legislation reflected a very cautious approach by Congress: one set standards for hydraulic brake fluid, Pub. L. No. 87-637, 76 Stat. 437, 15 U.S.C. § 1301 (September 5, 1962) (repealed 1966); another set certain minimum standards for manual seatbelts, but did not require them, Pub. L. No. 88-201, 77 Stat. 361, 15 U.S.C. § 1321 (December 13, 1963) (repealed 1966); and a third authorized the General Services Administration to set a wider range of standards for cars to be bought for the Government's fleet. Pub. L. No. 88-515, 78 Stat. 696, 40 U.S.C. §§ 701-03. (August 30, 1964).

[14] S. Rept. No. 1301, 89th Cong., 2d Sess. 2 (1966) [hereinafter cited as Senate Report].

authority largely discretionary. Second, amendments to the Administration bill proposed by the industry would have permitted the Secretary to set a standard only after following a complicated procedure and only where he could make explicit findings of fact pertaining to the relative costs and benefits of any proposed standard. Finally, the Mackay bill (H.R. 12548, 89th Cong., 2d Sess. (1966), introduced by Rep. Mackay) favored an approach that retained the broad authority of the Administration's bill but made the exercise of that authority *mandatory*.[15] Congress adopted the latter approach in the Safety Act.

1. *The major concern of Congress was the "second collision" problem.* While the Safety Act reflects a Congressional concern with all aspects of motor vehicle safety, its legislative history indicates that the major concern was death and injury due to the "second collision" of the occupant with the interior of the automobile.[16] No other aspect of auto safety so attracted the concern and attention of the Congress.

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[15] The Administration and Mackay bills are reproduced, in pertinent part, in the appendix to this Brief. (App. 25a-31a, 32a-45a) The industry proposal appears in full in *Traffic Safety: Hearings Before the Interstate & Foreign Commerce Committee, House of Representatives*, Part 2, 89th Cong., 2d Sess. 1198 *et seq.* (1966). It is outlined in a submission of the Department of Justice, 112 Cong. Rec. 19640 (Aug. 17, 1966), which is reproduced in its entirety in the appendix to this Brief. (App. 4a-24a)

[16] The House Committee Report began its explanation of the need for the legislation with a few sentences decrying the toll of deaths and injuries. It then turned immediately to the second collision: "[p]assengers riding in vehicles moving at speeds of 60 and 70 miles per hour or even higher speeds need to be protected in the event that an accident does occur. The committee is satisfied that such protection can be afforded at least to a degree substantially greater than that which exists at present, if all reasonable steps are taken to minimize the impact which results after an accident occurs between two vehicles or a vehicle and a stationary object." H.R. Rept. No. 1776, 89th Cong., 2d Sess. 10 (1966) [hereinafter cited as House Report]. This concern was echoed by the Senate Committee. *See* Senate Report at 3. It also surfaced repeatedly in the floor debate. *See* 112 Cong. Rec. 21490 (Senator Cotton); 14221 (Committee Chairman Magnuson); 14237 (Sen. Cotton); 14255 (Sens. Byrd and Yarborough); 19630 (Rep. Springer); and 19633 (Rep. Moss) (1966).

2. *Congress required the issuance of mandatory standards.* At the threshold of committee consideration were two questions: should the Executive Branch be required to issue safety standards in the first instance; and should compliance with safety standards be mandatory or voluntary?

The reports indicate no sentiment for a discretionary or voluntary approach. The House Committee noted that, with few exceptions, witnesses at its hearing "favored the imposition of mandatory Federal Safety standards." House Report at 12. The Senate Committee listed the following as first among six "basic needs" to be served by Federal legislation: "[t]he promotion of motor vehicle safety through voluntary standards has largely failed. The unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll." Senate Report at 4.

As to whether the issuance of standards should be required, the Administration bill would have given the Secretary the authority to impose standards if he found that existing standards (imposed by various states and federal agencies such as GSA) were inadequate. Such determination could not be made until two years after enactment. There was no requirement that the Secretary promulgate any standards. Both the House and Senate committees pointedly rejected this approach, noting that the bills before them *required* the promulgation of safety standards. This choice was also repeatedly emphasized in the floor debates.[17]

Congress also made clear that it was not prepared to accept delays in the promulgation of standards. The Administration bill provided that the Secretary should have two years within which to decide whether to promulgate new safety standards in addition to those then in effect. Congress, however, directed the Secretary to issue, before January 31, 1967, initial safety standards based upon those already in existence and revised standards the following year. 15 U.S.C. § 1392(h).

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[17] *See* House Report at 15, 16; Senate Report at 2; 112 Cong. Rec. 19629 (Chairman Staggers), 19630 (Rep. Springer), 19633 (Rep. Moss); 19653 (Rep. Sickles), 19654 (Rep. Tenzer) and 14230-31 (Sen. Ribicoff) (1966).

3. *Congress directed the Secretary to force the development and application of new technology.* Another major issue facing the Congress was whether to continue to rely entirely on the industry to improve safety technology. It is clear from the legislative history that Congress was thoroughly dissatisfied with the industry's safety initiatives up to that time.[18] The choices made in the markup illustrate how that dissatisfaction evolved into a determination that safety technology no longer be dependent on what the industry alone offered. For example, the industry bill would have placed responsibility for initiating standards upon an existing multi-state commission, subject to individual state ratification and dependent almost entirely on the industry for safety research. App. 9a. In a letter to the committees on behalf of the Administration, the Justice Department analyzed in detail how the proposed procedure would produce long delays and watered down standards, with "the timing and introduction of new safety devices largely in the hands of the industry." *Id.* at 7a. This approach was rejected in favor of a provision that the "Secretary *shall establish* by order appropriate Federal motor vehicle safety standards." 15 U.S.C. § 1392(a) (emphasis added).

The Administration bill recognized the need for the Federal government to develop its own capability to initiate new technology. It provided that the "Secretary . . . *is authorized* to undertake appropriate research, testing and development for motor vehicle safety and motor vehicle safety standards . . . ." H.R. 13228, 89th Cong., 2d Sess. § 104 (1966); App. 36a (emphasis added). This approach was also rejected in favor of a provision that the "Secretary *shall* conduct, research, testing, development and training necessary to carry out the purposes of this title," 15 U.S.C. § 1395(a) (emphasis added), and a requirement that such results *shall* be considered in the promulgation of standards. 15 U.S.C. § 1392(f)(1) (emphasis

[18] "The committee met with disturbing evidence of the automobile industry's chronic subordination of safe design to promotional styling, and of an overriding stress on power, acceleration, speed, and ride to the relative neglect of safe performance or collision protection. The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in industry which has plainly resulted in the inadequate allocation of resources to safety engineering." Senate Report at 2.

added). The committee reports and floor debate leave no doubt that the choice of this language was intentional.[19] The legislative history also makes clear, however, that Congress did not intend that the agency's research efforts would serve as a substitute for the "creative energies and vast technology of the automobile industry" which would be triggered by the imposition of performance (rather than design) standards. Senate Report at 1, 6.

In *Chrysler Corp. v. Department of Transportation*, 472 F.2d 659 (6th Cir. 1972), the manufacturers argued that a safety standard, and specifically a passive restraint requirement, could not go beyond on-the-shelf technology. Noting the industry proposal rejected by Congress in 1966, the court stated that "we must decline to write into the Act the very same suggestions which Congress declined to write into the Act." *Id.* at 672 n. 16. Finding that Congress intended the Safety Act to be "technology forcing," an interpretation concurred in by NHTSA in Notice 25, Pet. App. 116a, the court went on to explain that purpose as follows: "the explicit purpose of the Act, as amplified by its legislative history, is to enable the Federal government to impel automobile manufacturers to *develop and apply* new technology to the task of improving the safety design of the automobile as readily as possible." 472 F.2d at 671 (emphasis added).

B. Congress Ruled Out A Strict Cost/Benefit Analysis For Safety Standards. Instead, Safety Must Be The Paramount Consideration Whenever Costs Are Considered.

The industry also proposed that the Secretary adopt a substantially different method of balancing costs and benefits than that adopted in the Safety Act. Section 102(h) of the industry bill listed a number of factors required to be considered by the Secretary in promulgating standards. One provided that: "[t]he benefit to be derived by any Federal motor vehicle

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[19] "The Federal government must develop ... a technical capacity *capable of initiating innovation* in safety design and engineering ...; and ... capable of developing and implementing meaningful standards for automotive safety." Senate Report at 4 (emphasis added). *See also* 112 Cong. Rec. 19635 (Rep. Mackay) (1966).

safety standard should be *clearly warranted* in light of all relevant factors." App. 15a. Another factor provided that standards should embody *feasible* devices and techniques that are available in a reasonable time *and at costs commensurate with "the benefit to be achieved."* *Id.* The Administration opposed these provisions as "overly protective to industry interests," "weighted against the desirability of action," and likely to impair the effectiveness of safety standards. *Id.* at 7a-8a.

Congress not only failed to adopt these industry proposals, it made clear that it had in mind an entirely different calculus. Both committees dealt specifically with the question of how to balance costs against improved safety. The House Committee stated that consideration of whether a standard would be "practicable" required consideration of "all relevant factors including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." However, it went on to state in the next sentence that "motor vehicle safety is the *paramount purpose* of this bill and each standard must be related thereto." House Report at 16 (emphasis added). The Senate Committee similarly stated that cost was relevant but secondary to safety: "[t]he committee intends that *safety shall be the overriding consideration* in the issuance of standards under this bill." Senate Report at 6 (emphasis added).[20] The bills adopted by the House and Senate committees were very similar and provoked little controversy in the floor debate, a debate characterized by a parade of speakers deploring the highway death toll and commending the committee action. The roll call vote in each house was unanimous. 112 Cong. Rec. 14256 (June 24, 1966) (Senate), 19669 (Aug. 17, 1966) (House).

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[20] A colloquy on the floor between Commerce Committee Chairman Magnuson and Senator Lausche was addressed to this language in the Report. It made clear that the language allowing for consideration of costs but declaring safety to be the overriding consideration was specifically intended to be used as an aid in interpreting the terms "reasonable," "practicable" and "appropriate," especially with reference to the question of how much the Secretary should consider "the cost that would be added to the automobile." 112 Cong. Rec. 14245 (1966).

II. MEASURED AGAINST THE SAFETY ACT AND THE RECORD, THERE ARE FOUR REASONS WHY RESCISSION OF THE AUTOMATIC CRASH PROTECTION REQUIREMENT WAS UNLAWFUL.

NHTSA's explanation in Notice 25 for its decision to terminate the automatic crash protection requirement was deceptively simple. Noting the recently announced intention of some manufacturers to rely on the detachable automatic belt for compliance, NHTSA concluded that it could not predict with certainty more than a "possibly minimal" increase in belt usage over that experienced with manual belts and that this "possibly minimal" benefit would be offset by increased costs and other risks. After rejecting the possibility of interpreting or amending Standard 208 to eliminate this perceived loophole, NHTSA concluded that its only alternative was to rescind and to rely in the future on manual belts and an educational campaign.

The practical effect of Notice 25 was to turn the clock back to the period before 1966 when voluntarism, industry initiative and educational campaigns were the norm, when safety technology depended entirely on what the manufacturers saw fit to develop and offer. At the very least, this dramatic reversal of the statutory mandate required some rational explanation by NHTSA, or, as the court of appeals stated, "[a]n agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress." Pet. App. 48a.

Notice 25 also wrote off a decade of carefully recorded and analyzed experience with automatic crash protection on the grounds that none of it was precisely on point with the anticipated future reliance on detachable automatic belts. This reflected a fundamental misunderstanding of the purpose of the Safety Act. Under a technology forcing scheme, there can never be experience that is precisely on point. The situation with respect to automatic crash protection was unusual in this respect only to the extent that: (1) there was an enormous record supporting the need for, and efficacy of, automatic crash protection devices; and (2) the record made it equally clear

that manual seat belts were an unacceptable alternative. Again, NHTSA was required to offer something other than a nonrational explanation for ignoring this record.

Four basic subjects were discussed in varying degrees in Notice 25—usage rates, costs versus benefits, the effect of rescission and alternatives less drastic than rescission. In each instance, NHTSA's discussion was arbitrary and capricious, in direct contravention of the Safety Act, or both.

A. NHTSA's Conclusions About The Possible Usage Rate For Detachable Automatic Belts Ignored Both The Record And Common Sense.

1. *NHTSA emphasized the detachability feature while largely ignoring that the belts would also be automatic.* NHTSA's explanation of why detachable automatic belts would generate little or no increase in usage is set forth in the margin.[21] NHTSA's pessimistic views about future usage rates rested essentially on that reasoning. While NHTSA's statements in Notice 25 about future usage rates varied considerably, all rested on the premise that detachable automatic belts, because they are detachable, "differ little from existing manual belts." Pet. App. 112a.[22]

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[21] "Most planned automatic belts would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently.

* * *

"Some belt designs may be detached and permanently stowed as readily as the current manual lap and shoulder belts. Once a detachable automatic belt is detached, it becomes identical to a manual belt. Contrary to assertions of some supporters of the standard, its use thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts. If the car owners perceive the belts as simply a different configuration of the current manual belts, this stumbling block is likely to remain. They may treat the belt as a manual one and thus never develop the habit of simply leaving the belt attached so that it can act as an automatic belt." Pet. App. 97a-99a.

[22] NHTSA's usage rate findings aside, *any* automatic belt differs from a manual belt in one significant respect: it has passed the dynamic testing requirements of Standard 208, *i.e.*, it has demonstrated survivability in actual

(footnote continues)

NHTSA's analysis was utterly irrational. The seat belts in question are detachable, but they are *also automatic!* It was incumbent upon the agency to give at least some rational consideration to the impact on usage rates of the automatic feature as well as the detachability feature. Common sense suggests that any device which works automatically will attract greater usage than a manual device. There is no intuitive reason why that would not be true of seat belts.

NHTSA need not have speculated, however, about intuitive probabilities. There was abundant evidence in the record confirming that automatic belts would generate increased usage simply because they are automatic. Notice 25 revealed no serious consideration of that evidence. It did mention, in two places, the possibility that automatic operation would generate increased usage, but in both instances its discussion was irrational or incomprehensible. First, the record evidence:

a. *The record established the effectiveness of any automatic belt.* Over a period of years prior to the issuance of Notice 25, NHTSA commissioned a variety of surveys of public attitudes in an effort to better understand why people were not using manual seat belts and how they would react to passive restraints. The results of those surveys are in the record. The surveys reveal a consistent "hard core" of 20-40% of the population which is firmly opposed to wearing manual seat belts and is not likely to respond to efforts to encourage usage. C.A. App. 93. For the rest of the population, the surveys show the reasons for nonusage are of the more everday variety, the same type of reasons people find themselves without keys or umbrellas when they need them. In one survey, for example, 68% of the respondents gave "bothersome" "inconvenient" or

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(footnote continued)

crash tests. A manual belt, on the other hand, must meet only static test requirements establishing the strength of its various components. Although this does not necessarily mean that manual belts are unsafe, it does mean that the effectiveness of an automatic belt is assured with a higher degree of certainty.

"forgot" as reasons why they did not use their manual seat belts regularly. C.A. App. 81. In another survey, the respondents were asked why they thought people do not wear seat belts very much. "Too much time/hassle" and "not in habit/don't think about it/lazy" were reasons given by 47%. C.A. App. 1110. These, of course, are the very excuses that are eliminated by an automatic seat belt.

NHSTA also commissioned several surveys asking the general public specifically about automatic belts. A telephone survey taken in 1979 asked respondents what they thought about the idea of automatic seat belts in the next car they purchased. Over 63% said it was a great idea or at least one they would tolerate, compared to 32% who said they would disconnect the device. C.A. App. 93. A number of "focus groups" were convened at NHTSA's behest to discuss in greater depth with members of the general public their attitudes toward seat belts. These revealed a positive reaction to automatic belts and indicated that a common reaction to automatic belts was "relief" that they resolved people's "conflict between what they should do and what they actually do." C.A. App. 96-97.

Finally, NHTSA conducted extensive surveys among users of automatic belts in the two cars where such belts had actually been employed—the VW Rabbit and Chevrolet Chevette. Those surveys resulted in a wealth of information on both usage rates and attitudes toward such belts. The usage rate information consistently revealed more than a doubling of the rate experienced with manual belts. Pet. App. 18a-19a n.12. NHTSA devoted considerable attention to explaining why it refused to give any weight to that data. There was no discussion, however, of the *attitude* survey results.

The results of the attitude surveys are significant because they showed a shift of attitudes in favor of automatic belts over manual belts *based on actual experience with such belts.* For example, Rabbit and Chevette owners were asked to compare their first impression of automatic belts with their impressions after using them. In all cases the later impression was more favorable toward automatic belts. C.A. App. 92. Another survey question revealed that convenience, comfort, and

automatic operation ranked high among reasons owners liked their automatic belts and as reasons survey respondents would choose automatic belts in the next car they purchased. C.A. App. 942. Another series of questions asked whether 1980 Rabbit and Chevette owners would prefer an automatic belt in their next car. The answers are significant when compared to the percentage who appeared to be predisposed toward automatic belts at the time they bought a car so equipped: only 5% of the Chevette owners had specifically requested an automatic belt, but *44%* said they would prefer to also have one in their next car; and the comparable numbers for Rabbit owners were 12% "before" and *74%* "after." C.A. App. 90.

NHTSA had an obligation to consider rationally this evidence. Whatever the validity of the agency's refusal to give any weight to evidence of usage rates on Rabbits and Chevettes with automatic belts,[23] the reasoning applicable to the usage rate evidence was not applicable to the attitude evidence. For example, the ignition interlock on the Rabbit and 1978-79 Chevette arguably may have biased usage rates upward, but if it had any affect on attitudes, it was *negative*.[24] Similarly, NHTSA's concerns about the effect of demographics and voluntarism on usage data, however valid, have little applicability to the attitude survey results.[25] In any case, none of NHTSA's reasons for rejecting the usage data apply to the surveys which measured changes in attitudes toward automatic belts within the same group of survey respondents.

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[23] The court of appeals correctly noted that "NHTSA's reasons for refusing to extrapolate from the available data are extremely weak." Pet. App. 52a-53a, n.30.

[24] For example, the record shows an 89% usage rate for the 1980 Rabbit with automatic belts. C.A. App. 89. Sixty-seven per cent of 1980 Rabbit owners indicated they would use their automatic seat belt even if there were no interlock, i.e., if it were fully detachable. C.A. App. 92. The latter figure, while lower than the usage rate, is still highly significant in an absolute sense.

[25] The survey data showed that a very small percentage of either the Chevette (5%) or Rabbit (12%) owners actually sought to acquire a car with automatic belts. C.A. App. 90, thus negating any effect voluntarism might have on the results. Similarly, there is no evidence that demographics is generally a factor in these surveys. In fact, the 1981 National Seat Belt Study found that "demographic and geographic data suggest that seat belt wearing is a behavior which perhaps more than most behaviors tends to cut across those usual lines of characterization." C.A. App. 1119.

NHTSA's failure to give any weight to this evidence is particularly indefensible when it had before it the analysis of its principal survey contractor, Opinion Research Corporation, as to what the results meant: "there is considerable evidence in both the current and previous studies that the automatic belt is superior to the manual belt as a use-inducing device. It can be expected that safety belt use among U.S. drivers will trend upwards as more new cars come equipped with the automatic restraint system." C.A. App. 1010.

Compounding this arbitrariness was the fact that the agency devoted considerable attention to public attitudes on other issues in the absence of supporting evidence. For example, one of NHTSA's reasons for rejecting any passive seat belt was the public's "fear of entrapment" by seat belts. NHTSA described this fear as "widespread." Pet. App. 110a. In fact, it was a reason given by only 7% of the respondents in the 1981 National Seat Belt Study. NHTSA chose to ignore other responses that established the amenability of at least 47% of the respondents to automatic features. C.A. App. 1108.

Even more remarkable was NHTSA's readiness to speculate that public attitudes toward safety or passive restraints would be adversely affected by continuing the passive restraint program. This was identified by NHTSA as the "principal risk" of continuing Standard 208. Pet App. 114a. NHTSA's conclusions in this respect—except as they might apply to "hard core" nonusers—have no evidentiary support. No attitude surveys were cited to justify NHTSA's fears and there were none. At the same time, the survey evidence which showed receptive attitudes toward automatic belts was ignored.

b. *NHTSA did not rationally discuss this record.* The possibility that automatic belts would generate increased usage simply because they are automatic was mentioned twice in Notice 25. On both occasions NHTSA's discussion was nonrational. NHTSA's first consideration of the issue was the following statement:

> The agency recognizes the possibility that the exposure of some new car purchasers to attached automatic belts may convert some previously occasional users of manual belts to full time belt users.

> Present attitudinal survey data clearly establish the existence of a population of such occupants who could be influenced by some external factor to convert to relatively constant users. However, the agency believes that many purchasers of new cars having detachable automatic belts would not experience the potential use-inducing character of attached automatic belts unless they had taken the initiative themselves to attach the belts.

Pet. App. 99a.

The final sentence presumably explains NHTSA's thinking. It is, to say the least, puzzling. First, the agency seems to be saying that automatic belts would not be used because the occupant would have to take the initiative to attach the belt. However, the essence of an automatic belt is that it does not need to be attached. It automatically makes the decision to "buckle up." Second, NHTSA may be saying that if an automatic belt is detached, it may never be reattached for reasons of laziness or forgetfulness. This implies, however, that occupants will detach automatic belts with the same frequency they fail to attach manual belts—a conclusion contradicted by common sense and the evidence, especially since the population at issue consists of "previously occasional users of seat belts." In any event, the 4-8 second audible warning and continuous (until the belt is pulled out or attached) warning light required by Standard 208, *see infra* p. 25, would remind forgetful drivers that their automatic belts were detached.

NHTSA's second occasion for addressing this matter was in its "Summary of Agency Conclusion." The discussion began as follows :

> Certainly, while a large portion of the population appears to find safety belts uncomfortable or refuses to wear them for other reasons, there is a sizeable segment of the population that finds belts acceptable but still does not use them. It is plausible to assume that some people in this group who would not otherwise use manual belts would not disconnect automatic belts.

> It is this same population that will generate all of the benefits that result directly and solely from this regulation.

Pet. App. 113a.

The "sizeable segment" referred to is necessarily the 60-80% of the population who are not "hard core" nonusers. NHTSA's statement would thus seem to indicate a substantial increase in usage. NHTSA did not deny this. Instead its analysis went on as follows:

> This is a population that can also be reached in other ways. The Agency, state governments and the private sector are in the process of expanding and initiating major national belt use educational programs of unprecedented scale. While undertaken entirely apart from the pending proceeding, the fact remains that this effort will predominantly affect the same population that the automatic belts would be aimed at.

Pet. App. 113a-114a.

Apart from the fact that Congress created NHTSA to establish *mandatory standards* rather than to conduct voluntary programs, this thought raises the obvious question: would not an educational program *with* automatic belts increase usage even more? NHTSA's next sentences attempted to address this: "On the one hand, it could be argued that the success of any belt use program would only be enhanced by the installation of automatic belts. Individuals who can be convinced of the utility of safety belts would presumably have an easier time accepting an automatic belt." Pet. App. 114a. This sensible notion was, however, immediately rejected with another question-begging nonsequitur: "On the other hand, there is little evidence that the standard itself will materially increase usage levels above those otherwise achievable." *Id.*

Thus, in the course of a few sentences, NHTSA: (1) acknowledged that automatic belts could increase usage by a large segment of the population because they are automatic; (2) acknowledged that such use could be increased even further by a public educational campaign; but (3) rejected the

whole concept because automatic belts will *not* materially increase usage! This was NHTSA's entire discussion of the question of whether passive belts, even if detachable, would generate significant increases in usage because they are automatic. Rational decision making simply does not permit NHTSA to answer that fundamental question by reiterating in different words that the belts are detachable.

2. *NHTSA also failed to consider the effect on usage rates of the emergency release warning light, a warning light intended to discourage detachment of automatic belts.* NHTSA's repeated emphasis on the similarities of detachable automatic belts to manual belts also ignored the warning system required by Standard 208 for automatic belts when the emergency release mechanism is activated. The requirement for manual belts is a 4-8 second continuous or flashing light when the ignition is turned on, coupled with a 4-8 second audible signal if the belt is not fastened. (The Safety Act proscribes a "continuous buzzer" requirement, but not other audible signals.) 49 C.F.R. § 571.208-S7.3. By contrast, automatic belts are required to show a flashing or continuous warning light *at all times* if the belt is detached (and until it is reattached or pulled out). 49 C.F.R. § 571.208-S4.5.3.3. This different warning system was deliberately adopted to help assure that automatic belts were not left in the detached position.[26]

The record, moreover, contained evidence bearing directly on the effectiveness of warning lights combined with automatic operation in inducing belt usage. A survey taken by General Motors between November, 1978 and April, 1979 measured usage rates in a fleet of 90 rental Chevettes in Orlando, Florida. C.A. App. 94-95. Five different combinations of belts and

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[26] "In order to insure that vehicles occupants are aware if their passive belts are inoperable because a release mechanism has been activated, this amendment specifies that the warning light, "Fasten Belts," remain illuminated until the belt latch mechanism has been fastened or the release mechanism has been deactivated .... The agency believes a continuous warning light is essential since this amendment will allow various types of unfamiliar release systems for passive belts." 43 Fed. Reg. 52493, 52494 (Nov. 13, 1978). C.A. App. 1705, 1706.

"reminder systems" were tested, with 18 cars configured to each combination. Belt usage was recorded electronically. One of the five systems consisted of a detachable automatic shoulder belt and manual lap belt. The warning system for the shoulder belt was essentially the same as that required by Standard 208 for automatic belts—a 4-8 second buzzer and a light that remained on as long as the shoulder belt was detached. The survey, based on 13,200 ignition starts, showed 23% usage of the automatic shoulder belt compared to 13% for the manual lap belt.[27]

GM concluded that the 23% usage rate for the automatic shoulder belt with a warning light was relatively ineffective. GM Submission to Docket #74-14, N22, 74-14-NPRM-N22-068. This was correct only in relation to a striking 57% usage rate on another tested restraint system which employed a continuous audible warning as well as a flashing light if the belt was detached. The significance of the GM data for this case—apart from illustrating how easy it would be for GM to remedy the problems it perceives with detachable belts—is that they revealed that a detachable automatic belt with a warning light such as that required by Standard 208 *increased belt usage by ten percentage points* over manual belts with manual belt warning systems.

A ten percentage point increase would almost double present usage. A ten percentage point increase in usage would save approximately 1800 lives and 36,000 serious injuries each year. *See infra* p. 29. While ten percentage points may be relatively ineffective in relation to what NHTSA could achieve with audible as well as visual warnings, it is strongly suggestive of what NHTSA could achieve simply by allowing Standard 208 to take effect. As such, it would be the largest single step toward reducing second collision deaths and injuries since passage of the Safety Act seventeen years ago.

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[27] One of the other systems tested was a standard manual belt with the required 4-8 second warnings. It also produced a 13% usage rate.

Notice 25 gave no consideration to this GM survey data, and it was discussed only briefly, and illogically, in the Regulatory Impact Analysis.[28] In any event, this was evidence which required fuller and more rational consideration than NHTSA gave it.[29]

B. NHTSA's Method Of Cost/Benefit Analysis Was Inconsistent With The Safety Act.

NHTSA justified rescission by weighing the "uncertain benefits" of the least effective passive restraint technology against a projected cost of $980 million and the risk of an adverse public reaction. This justification was, of course, undermined by NHTSA's failure to analyze rationally the life saving benefits of detachable automatic belts, as discussed above. However, even if NHTSA's conclusions on usage rates were rational, its analysis of risks and costs in relation to benefits would still have to be set aside as arbitrary and capricious and contrary to the Safety Act.

As discussed in the context of the legislative history of the Safety Act, *infra* p. 15-16, NHTSA's consideration of safety standards is most emphatically not to be based on a strict

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[28] The Regulatory Impact Analysis concluded that although the survey did "demonstrate the relative efficiency of use-inducing systems," the results could not be used because the car renters might have thought that "the buzzer or light doesn't work correctly, etc." C.A. App. 94. If that was correct, however, it would mean that the survey results were *understated in terms of usage*.

[29] Another use-compelling feature not discussed by NHTSA related to the GM-type belt, the only detachable automatic belt produced to date. As shown in Figure 3, App. 3, once that belt is detached, the loose ends leading to the door do not retract but instead must be refastened to the front of the door. Thus, rather than "out of sight, out of mind," the detached belt is draped across the door, a constant reminder that the automatic feature is not being used. Given the ingenuity of the manufacturers, a retractor of some sort could probably be added to negate this bothersome reminder of automobile safety, but the point is that it was *not* added to the only detachable belt that NHTSA actually had before it.

cost/benefit analysis.[30] Congress specifically rejected this approach and required, instead, a balancing test where cost is secondary and safety "overriding" or "paramount." In other words, the balancing was to be biased *in favor of safety.* NHTSA acknowledged as much in its Regulatory Impact Analysis, C.A. App. 276, but its analysis in Notice 25 directly contradicted this mandate.

1. *It was biased against probable safety benefits.* NHTSA's decision rests heavily on the kind of generalized cost/benefit analysis summed up in the following statement from Notice 25: "[i]n view of the possibly minimal safety benefits and substantial costs of implementing the automatic restraint requirements, the agency is unable to conclude that the incremental costs of the requirements are reasonable. The requirements are, in that respect, impracticable." Pet. App. 105a. In other words, NHTSA balanced forecast costs not against forecast benefits, but against worst case ("possibly minimal") benefits. Conventional cost/benefit analysis in the context of public health and safety regulation has frequently been criticized as biased because it is usually much easier to identify and quantify costs than benefits. NHTSA's approach added another, more significant kind of bias to the process.

It is difficult to know exactly what NHTSA meant by "possibly minimal" increases in usage rates and safety benefits. In its April, 1981 Notice of Rulemaking the Agency assumed a *minimum* usage rate of 22% or double present usage. Pet. App. 100a. Notice 25 adopted a more pessimistic tone without citing any specific evidence to support the change. The agency's pessimism was, however, evidenced in a variety of statements on usage rates, no two the same.

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[30] *Cf. American Textile Mfrs. Inst. v. Donovan,* 452 U.S. 490, 510 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.") NHTSA only has this authority when it considers the imposition of bumper standards, non-safety regulations that carry with them a specific statutory requirement for a cost/benefit analysis. *See* Motor Vehicle Information and Cost Savings Act of 1972, Section 102(b)(1), 15 U.S.C. § 1912(b)(1) (1976).

At one point the agency said it "cannot reliably predict even a 5 percentage point increase." Pet. App. 104a. The operative word seems to be "reliably" since in the same paragraph NHTSA said it " . . . is unable to assess the probability that the actual incremental usage would fall near a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase." *Id.* Other statements by NHTSA suggest, however, that it did not seriously entertain the possibility of a zero increase in usage. For example: "[o]n the other hand, the agency is not able to agree with assertions that there will be absolutely no increase in belt use as a result of automatic belts." Pet. App. 113a. Later, NHTSA seemed certain of at least an increase of several percentage points: "[t]he agency has now determined that there is no certainty that detachable automatic belts would produce more than a *several* percentage point increase in usage." Pet. App. 118a (emphasis added). NHTSA then went on to consider, for the first time, that not all cars would be equipped with detachable automatic belts. NHTSA acknowledged that "[t]he small number of cars that would have been equipped with automatic belts having use inducing features or with airbags would not have added more than *several more percentage points* to that amount." *Id.* (emphasis added). This additional "several" percentage points of increase appears to be conservative. *See infra* p. 35-36. In any event, combining the *several* percentage points of increase from detachable automatic belts with the *several* percentage points of increase from "use inducing" belts and air bags, a total usage rate increase in the 5% to 10% range would appear to be consistent with NHTSA's own findings.

Despite NHTSA's vague and contradictory observations about usage rates, it is possible to reach some conclusions about lives and injuries saved under the agency's worst case approach to benefits. According to the Regulatory Impact Analysis, each percentage point increase in usage will avoid 180 deaths and 3600 serious injuries each year. C.A. App. 147, 118.[31] Thus, an increase of only ten percentage points, which NHTSA regards

[31] NHTSA's figures assume a fleet fully equiped with passive restraints. Lives saved and injuries prevented each year would be less until that point is reached.

as possible (and originally regarded as minimal) would avoid 1800 deaths and 36,000 injuries. To save 1,000 lives and 20,000 serious injuries would require an increase of only 5.6 percentage points.

These potential savings in lives and injuries in relation to percentages of belt usage are based on actual experience—not, as in many other federal health and safety programs, on projections of inadequate data into unknowable benefits.[32] In absolute terms they are obviously substantial—a life saving potential counted in the thousands and reduced injuries counted in tens of thousands. It is inconceivable that the Congress which passed the Safety Act, a Congress which saw the problem not in the impersonal terms of usage rates, but in terms of death and injury and consequent human suffering and economic loss, intended the agency to turn its back on that potential unless there was compelling evidence that it was not "practicable" to achieve it.

2. *It was biased in favor of improbable costs.* By a series of calculations which erred heavily on the side of overstatement, NHTSA found that automatic belts would add an average of $75 [33] to the retail price of a new car plus fuel costs of $14. In 1981, the average new car sold for approximately $9,000. C.A. App. 227. Thus, a $75 increase in the purchase price for automatic seat belts would add less than 1% to the price of an average new car, far less than typical sales taxes, dealer preparation charges and many options. As the Regulatory

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[32] *Cf. Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 652 (1980) (OSHA benzene standard based on "safety factor of 10-100").

[33] The $75 estimate is the projected increase in the retail price attributable to an automatic belt, including profit for dealer and manufacturer. C.A. App. 210. It is based on a range of possible belt designs including some with features not required by Standard 208, features which in some cases (*i.e.*, easy storage and retractors/reels) could encourage detachment. By perverse logic these costs have been included because they allegedly increase consumer acceptance and "usage is a function of consumer acceptance . . . ." C.A. App. 202. The $75 estimate compares to an actual retail price of $50 for automatic belts in the VW Rabbit and $65 for the Chevette. C.A. App. 168. At several places in Notice 25, NHTSA appears to erroneously indicate that $89 is the increase in the retail price. Pet. App. 105a, 112a.

Impact Analysis acknowledged, the increase in cost attributable to automatic belts is such a small portion of normal price increases on new cars that it "may go undetected by consumers." C. A. App. 219. NHTSA nevertheless concluded that a price increase too small to be detected is too much to pay for the deaths and injuries even a minimal increase in usage would prevent. This methodology raises the question of whether even the existing manual seat belt requirement could be cost justified.[34]

The $75 estimate aside, NHTSA assumed no reductions in auto insurance premiums due to fewer injuries. According to NHTSA, "there does not appear to be any certainty" that owners would receive discounts. Pet. App. 106a. This not only reverses the burden of "certainty" to meet the agency's preordained conclusions, it defies the record which reflects the fact that insurance premiums (which are generally subject to state regulation) tend over time to be a function of insurance costs. As car safety increases, costs go down and so do premiums. This is shown in an analysis done by NHTSA estimating savings in insurance premiums related to increased use of passive restraints. Discounted to present value,[35] it showed savings of $79 per vehicle if a 22% usage rate for passive restraints was achieved, C.A. App. 162; *i.e.*, enough to *eliminate entirely* the added retail cost.

The cost to society of motor vehicle accidents was prominently mentioned in the legislative history as a reason for

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[34] NHTSA estimated that the incremental retail cost of a manual belt was $50-75 per car, C.A. App. 202, nearly as much as the incremental retail cost of an automatic belt. C.A. App. 210. If automatic belts were not cost justified even if they produced an incremental increase in usage rates of 11%, C.A. App. 284, it seems doubtful that manual belts, which currently produce an overall usage rate of approximately 11%, could be found cost-effective.

[35] Long term costs were used since actuarially-based premium reductions require experience and hence lag behind safety costs. C.A. App. 149-50. However, many auto insurers have tried to encourage passive restraints by offering judgmental discounts to purchasers of cars with passive restraints and as of March, 1981, six of the twelve largest automobile insurers offered such discounts. C.A. App. 1353.

enactment of the Safety Act. *See, e.g.*, 112 Cong. Rec. 19647 (Rep. Ryan). While this does not necessarily require NHTSA to focus on societal cost in every decision, it is impossible to understand how the agency could have been certain that it was not worth $75 a car to save, at a minimum, 1,000 lives and 20,000 injuries annually when its own estimates of societal cost savings showed them to be substantial.

NHTSA made such estimates in a portion of its Regulatory Impact Analysis directed to rebutting another cost/benefit projection. In its calculations, NHTSA estimated the present value to society for each life saved at $314,000 to $448,000, and for each serious injury avoided at $15,140 to $18,110, depending on the discount rate used. C.A. App. 278. Using those assumptions, the avoidance of 1,000 deaths and 20,000 serious injuries, (a 5.6 percentage point increase in usage rates), would produce societal benefits of $616 to $810 million. Similarly, a 10 percentage point increase would produce societal benefits of $1.11 to $1.46 billion. Thus, even accepting NHTSA's minimal usage rate estimates and assumed costs, the benefits were significant in relation to the added costs. Given this, and the Safety Act's bias toward safety, NHTSA had no discretion to rescind on the basis of a comparison of costs and benefits.

3. *It erroneously relied on the risk of adverse public reaction.* NHTSA described the possibility of adverse public reaction as the "principal risk" of nonrescission, Pet App. 114a, and went on to describe that risk as follows:

> If the detachable automatic belts do not produce more than negligible safety benefits, then regardless of the benefits attributable to the small number of other types of automatic restraints planned to be installed, the public may resent being required to pay substantially more for the automatic systems. Many if not most consumers could well conclude that the automatic belts would in fact provide them with no different freedom of choice about usage or levels of protection than manual belts currently offer. As a result, it is not unreasonable to conclude that the

> public may regard the automatic restraint requirements as an expensive example of ineffective regulation.

Pet. App. 107a-108a.

Later in its discussion, NHTSA also spoke of the automatic seat belt perjoratively as a means of converting the Safety Act into a "people forcing" statute, one which "force[s] people to accept protection that they do not choose for themselves." Pet. App. 116a. There are two principal problems with NHTSA's analysis, and each underscores the basic nonrationality of Notice 25.

1. The logic was the reverse of that used to analyze usage rates. The reason NHTSA found that usage rates would not increase significantly is because detachable belts could be detached permanently and therefore would *not* be "people forcing." Early in Notice 25, NHTSA described detachable automatic belts as restraints which "manufacturers have designed . . . to avoid creating a significant adverse reaction." Pet. App. 92a. The discussion of public attitudes proceeded on the exact opposite assumption and ignored the evidence that a substantial segment of the population would in fact choose automatic protection for themselves if it were given the opportunity.

2. It misconceived the agency's role. Public attitude is a relevant consideration only where it may affect usage of the safety device. *See, e.g., Pacific Legal Foundation v. Department of Transportation,* 593 F.2d at 1345-46. This is different from an implied public referendum concerning the expense of motor vehicle safety regulation. Congress has decided to regulate motor vehicle safety and has provided for consideration of the cost of such regulation. In doing so, Congress presumably has taken into account public reaction to the cost of regulation. If Congress finds it has misjudged public reaction and wants to change the law, it knows how to do so, as illustrated by the amendments to the Safety Act provoked by the ignition interlock.

Congress clearly did not delegate to the agency the right to make independent judgments about the public popularity of the statutory scheme and to refuse to act on that account. It did not grant the agency the right to veto the Congressional purpose because of the agency's different idea about what the public would like.

C. NHTSA Failed To Analyze Rationally The Consequences Of Rescission, Although The Most Probable Consequence Was The Termination Of Technology Required By The Safety Act.

Almost all of Notice 25 was devoted to an analysis of the consequences of retaining a passive restraint requirement. As discussed above, the errors in that analysis are sufficient to establish the unlawfulness of the agency action. But it was equally unlawful because of NHTSA's failure to weigh the consequences of *rescinding* the passive restraint requirement. In the face of a technology *forcing* mandate NHTSA took a technology *terminating* action, and it did so without rational discussion of the relevant factors.

Eliminating Standard 208 involved far more than eliminating detachable automatic belts. Standard 208 could be satisfied with other technologies even more effective in meeting the need for motor vehicle safelty. These include automatic belts which have emergency releases but which are not totally detachable, *e.g.*, the design that generated a 70% usage rate in 1980 Chevettes. Pet. App. 19a n.12. Other belt designs, such as that on the VW Rabbit, have shown an ability to generate usage by virtue of a convenient and comfortable design. And, of course, air bags, the state-of-the-art technology, are effective and completely unobtrusive.

NHTSA did not, and could not, find that all of these more effective technologies would be abandoned by manufacturers if the passive restraint requirement were maintained. It found only that, "[a]lthough some aspects of the car manufacturers' automatic belt plans are still tentative, it now appears reasonably certain that if the automatic restraint requirements were implemented, the overwhelming majority of new cars would be equipped with automatic belts that are detachable. . . ." Pet.

App. 97a. Even if this finding is accepted as reasonable,[36] it nevertheless does not answer the question of what mix of passive restraints would be offered *in the long run* if a variety of passive restraints were available to the public initially. Would the manufacturers stick to these plans or would more effective technologies tend to assume a greater role? NHTSA apparently assumed, without discussion, that the passive restraints actually offered to the public over the long run would conform to these initial and "tentative" plans. In so doing, it closed its eyes to the fact that many commonplace design and engineering features on cars today are the result of a competitive response, rather than the initial plans, of a leading manufacturer. Two factors—competition and product liability—suggest that long run, "real world" offerings of passive restraints would probably be different from initial compliance plans.

As to competition, the Safety Act calls for performance rather than design standards because of a Congressional "faith" that such standards, once in effect, would induce "a vigorous and competitive effort to improve the safety of vehicles." Senate Report at 1, 6. The essence of this idea, however, is that before the marketplace will begin to produce better safety, *the standard must be in effect.*[37] There was strong evidence that the "faith" Congress placed in the marketplace was not misplaced,[38] and if NHTSA entertained doubts they were nowhere expressed in Notice 25.

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[36] Although the court of appeals deferred to this finding, it noted that it might nevertheless be erroneous. Pet. App. 50a, n.27.

[37] In economic terms, a passive restraint requirement is necessary because of a "real market failure situation." Arnould & Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 Bell Journal of Economics, 27, 46 (Spring, 1981) C.A. App. 714, 733. The fact that this is precisely what happened prior to 1966 is one of the reasons Congress passed the Safety Act, *infra* p. 13; and considering the rapid destruction of passive restraint programs after Notice 25 was issued, *infra* p. 7, it is likely to happen again absent a requirement.

[38] There is substantial evidence in the record, including the attitude evidence noted *infra* at 20-22 and eleven major public opinion polls

(footnote continues)

As to product liability, the so-called "Larsen rule" holds that "[i]f an article can be made safer and the hazard of harm may be mitigated 'by an alternate design or device at no substantial increase in price,' then the manufacturer has a duty to adopt such a design. . . ." *Dreisonstock v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1073 (4th Cir. 1974).[39] The impact of these legal constraints on long run production went unexamined by NHTSA.

The record gives every reason to believe that, assuming a passive restraint requirement, the more effective automatic crash protection technology would eventually prevail in the marketplace; and absent such a requirement, all of such technology would be sacrificed. (This would be incorrect only to the extent that detachable automatic belts themselves proved to be highly effective.) Under the Safety Act, NHTSA was obliged to look beyond the manufacturers' initial plans before terminating Standard 208. Since a basic purpose of the Safety Act is its emphasis on the introduction of new safety technology, an agency which takes a step so plainly contrary to the statutory purpose must provide some indication that all relevant

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(footnote continued)

conducted since 1971 (many at the behest of the manufacturers), that consumers have a preference for more safety and, specifically, for automatic crash protection devices. C.A. App. 457-60. Similarly, there is no economic incentive for offering a degraded automatic crash protection device. In fact, the Regulatory Impact Analysis noted that GM's detachable belt installed on 1981 Cadillacs was "*more expensive* than the automatic system that was offered on its Chevette subcompact." C.A. App. 198 (emphasis added).

[39] This rule is followed in most jurisdictions. *See also Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833, 840-41 (3rd Cir.) *cert. denied*, 454 U.S. 867 (1981); *Huff v. White Motor Corp.*, 565 F.2d 104, 110-11 (7th Cir. 1977); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). As noted in *Seese*, "[t]he history of automobile products liability law has been one which has taken into account the urgent need to provide incentives to manufacturers to take those steps necessary to minimize potential harm-causing defects." 648 F.2d at 840. Section 108(c) of the Safety Act, 15 U.S.C. § 1397(c) (1976), is intended in part to preserve state common law theories of product liability and compliance with a safety standard is not a defense to liability. *See, Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *modified*, 670 F.2d 21, *order & reh'g denied*, 673 F.2d 911, *cert. denied* 103 S.Ct. 177 (1982).

factors have been considered. The effect of the marketplace on future improvements in safety was such a factor.

NHTSA's limited discussion of nondetachable belts and air bags certainly did not satisfy its burden of explanation. Three paragraphs in Notice 25 were devoted to a discussion of use-compelling belt designs, Pet. App. 109a-110a, but that discussion was totally misdirected. *See infra* p. 39. The possibility that, if the standard were retained, market forces might cause manufacturers to offer more appealing and effective belt designs was not mentioned. NHTSA's only discussion of the effect of rescission on air bag technology was the observation that the manufacturers' explanation that "they chose belt systems [rather than air bags] for compliance because of the competitive disadvantage of offering the relatively expensive, inadequately understood air bag . . . seems credible." Pet. App. 96a-97a. With that passing observation, NHTSA wrote an end to what was once called the "air bag standard."[40]

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[40] The abandonment of air bag technology is particularly significant since several manufacturers, including Mercedes-Benz, Volvo, and GM, had at least publicly discussed air bag production plans in recent years. *See infra* p. 7. The Regulatory Impact Analysis assumed model year 1984 sales of 50,000 air bag equipped vehicles, C.A. App. 144, if passive restraints were required, fewer than the 500,000 vehicles contemplated over a two year period for the Coleman Plan (although it would take less than 3% of projected production in model years 1984 and 1985 to reach that level, C.A. App. 41), but substantially more than the 5,000 vehicles in NHTSA's current GSA demonstration project. DOT brief, at 12, n.12. In other words, if the passive restraint requirement had not been rescinded there would at the very least be the equivalent of a substantial air bag "demonstration" in the marketplace. NHTSA, however, gave no consideration to whether competitive factors might then require manufacturers to offer such an option on their top-of-the-line cars. Nor did it ask itself whether such a "demonstration" might lead to the spread of air bags to lower priced cars—a path followed by many other automobile engineering and design innovations. Whatever the answer to these questions, NHTSA was required to at least ask them before discarding air bags with other means of compliance.

D. NHTSA Did Not Give Rational Consideration To The Numerous Alternatives Less Drastic Than Rescission.

The question of NHTSA's obligation to consider alternatives less drastic than rescinding the entire passive restraint requirement need not be reached if, as shown above, NHTSA's conclusions about detachable belts were arbitrary and capricious. If, however, those conclusions were valid, the agency still had an obligation under the Safety Act to preserve potentially effective safety technology. Throwing out the entire requirement because of an alleged design loophole selected by the manufacturers arguably may have been necessary,[41] but the agency had an obligation to address this question at least with enough precision to assure a reviewing court that there has been a "rational connection between the facts found and the choice made." *See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). This obligation does not carry with it the duty to examine every theoretical alternative to total rescission.[42] On the other hand, it does envision some consideration of *practical* alternatives.[43]

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[41] The court of appeals correctly observed that "[i]t is almost embarrassingly obvious that technology that does *not* meet the performance standard may *not* be used." Pet. App. 58a. The point of the discussion in the text above is that even if this is incorrect, *i.e.*, even if NHTSA had successfully created a loophole that wiped out all effective passive restraint technology, NHTSA could and *should* have given consideration to closing that loophole before it began to consider rescission.

[42] *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551, 553-54 (1978).

[43] The fact that NHTSA did at least attempt to consider alternatives in Notice 25 disposes of the *post hoc* arguments of petitioners that NHTSA was procedurally foreclosed from any effort to "fix" the passive restraint requirement. The history of the passive restraint requirement in general, and the "emergency escape" provision in particular, has been one of continuous regulatory "fixes" as required. Similarly, the court of appeals was hardly foreclosed from pointing this out by the teaching of *Vermont Yankee*, a decision that did proscribe procedural interference by a reviewing court but that did *not* hold that procedural discretion can be used to shield arbitrary and capricious action. *See Vermont Yankee*, 435 U.S. at 549 (remanding case to court of appeals for consideration of substantive lawfulness of agency decision).

NHTSA purported to consider alternatives but that consideration was arbitrary and capricious because it looked only at the theoretical alternatives and ignored on-the-shelf technology.

The discussion in Notice 25 of the alternatives to rescission encompassed three paragraphs in a section entitled "Option of Adopting Use-Compelling Features." Pet. App. 109a. NHTSA rejected this "option" on the basis of its discussion of ignition interlocks and belts which do not release to allow accident victims to be extricated. Both, however, were artificial alternatives, not seriously advocated by anyone as a way to induce higher usage. At no point did NHTSA discuss the fact that every automatic belt system it was presented with—and it had a least seven such systems before it at the time of rescission, C.A. App. 37—contained the "emergency release" mechanism required by Standard 208, yet *only* the GM-type belt was fully detachable. The 1980 Chevette system, for example, employed an emergency release mechanism that detached the lap portion while maintaining the continuous shoulder portion, yet it achieved a very high usage rate. GM also proposed another "spool-out" mechanism that met NHTSA's concerns. Pet. App. 110a. Finally, as GM had demonstrated, even a detachable belt produced very high usage rates when combined with both a warning light and an audible warning. *See infra* p. 26.

NHTSA had an obligation to consider genuine options rather than red herrings.[44] As shown, genuine options were available. NHTSA's failure to examine these practical but less drastic alternatives to total rescission was compounded by the "alternative methods of increasing restraint usage" it did adopt—an educational campaign. Pet. App. 110a. As noted previously, this is exactly the opposite of the statutory purpose, which is *not to accept* voluntary programs in lieu of mandatory

[44] The remaining reason give by NHTSA for not prescribing use-compelling alternatives was a fear that Congress "would look with some disfavor" upon it. Pet. App. 109a-10a. This conclusion, however, rests on the two alternatives NHTSA discussed, not the ones it did not discuss. In any event, NHTSA's job is to respond to the statute, not to its predictions of what may find favor with the current Congress.

standards.[45] On the other hand, the possibility of using an educational campaign to enhance the effectiveness of an automatic restraint requirement was not seriously or rationally considered.

III. PETITIONERS' ARGUMENTS FOCUS SOLELY ON THE OPINION OF THE COURT OF APPEALS, NOT ON THE LAWFULNESS OF THE AGENCY ACTION, AND THEY ARE COMPLETELY WITHOUT MERIT.

The ultimate issue in this case is the lawfulness of NHTSA's rescission of the automatic crash protection requirement.[46] Nevertheless, most of the pages in the petitioners' briefs are devoted to a relatively small number of pages in the court of appeals opinion, almost as if the debate over automatic crash protection first began on June 1, 1982 with the release of that opinion. These excerpts, largely taken out of context, are then compared with dicta from a variety of other sources, leading petitioners to conclude that the court of appeals adopted some radically new standard of review and committed other errors. Their criticism is without basis in fact or in law.

A. The Court Of Appeals Did Not Adopt A New Standard Of Review.

The central contention of the petitioners is that the court of appeals adopted a standard that bars an agency from rescinding a regulation if changed circumstances have led to "substantial uncertainty" about the regulation's continued value. That was *not* the holding of the court of appeals, either explicitly or implicitly. The court of appeals carefully followed the "arbitrary and capricious" standard of review as articulated

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[45] Apart from the fact that NHTSA was going to undertake this campaign in any event, C.A. App. 1218-19, it is painfully clear from the record that educational campaigns do not produce long term increases in belt usage. C.A. App. 313-14, 454, 520, 543-544, 672 and 732. NHTSA's current program of having celebrities urge people to "buckle up" is in the tradition of past failures.

[46] *Cf. Brown v. Allen*, 344 U.S. 443, 459 (1953); *B.F. Goodrich Co. v. U.S.*, 321 U.S. 126, 127 (1944); *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

by the Court in *Overton Park* and thereafter. Pet. App. 48a-49a.[47]

The petitioners have attempted to create a dispute where none exists by: (1) confusing the context in which the Section 10(e) standard of review has been applied with the standard itself; and (2) erroneously characterizing certain portions of the court of appeals opinion. Each is discussed below.

1. Petitioners seem to recognize that the arbitrary and capricious test is not a rigid scientific measurement, that it draws its meaning almost entirely from the context of each case. That, indeed, was the major point of the "refusal to promulgate" cases cited by the court of appeals and now urged by petitioners.[48] Petitioners also seem to recognize that the principal elements of that context are the statute and the record. Whether or not "substantial uncertainty" about the future, without more, might be an appropriate basis for agency action in another situation, the court of appeals found it was inappropriate in *this* case, given *this* statute and *this* record.

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[47] Although the standard is both narrow and deferential, the court still must make a "searching and careful" inquiry into the facts to determine if there is a "rational connection between the facts found and the choice made." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. at 285-86. The elaborate historical analysis of Section 10(e) in the DOT Brief, at 23-29, is not to the contrary. The point of that analysis, the overdrawn analogies aside, is that the standard of review is deferential, but, as the Court has repeatedly noted, it is not deferential to the point where even the most irrational of excuses proferred by an agency must be accepted at face value. The standard of review may well be deferential, indeed any standard other than de novo review necessarily entails a degree of deference, but it is deference that is applied *after* the statutory mandate and the facts are examined. To do otherwise, of course, would be to effectively make agency actions immune from judicial review.

[48] *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807, 817 (D.C. Cir. 1981) ("the parameters of the 'arbitrary and capricious' standard of review will vary with the context of the case"); *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*, 606 F.2d 1031, 1050 (D.C. Cir. 1979) ("the concept of 'arbitrary and capricious' review defies generalized application and demands, instead, close attention to the nature of the particular problem faced by the agency").

This statute, as discussed above, is not typical of regulatory statutes. It emphasizes duty as well as discretion and means —such as advancing new technology—as well as ends. NHTSA's mandate is to reduce deaths and injuries by issuing mandatory safety standards, not to decide whether that policy should be preferred over another. NHTSA is not administering the "supple instrument" of a public interest mandate in an economic regulatory statute, the situation presented in the cases relied upon the petitioners.[49]

This record was equally unique. It was dominated by the agency's complete reversal of direction from a course it had followed for over a decade. As the petitioners acknowledge, the court could not ignore the fact that there had been a departure from a "settled course." *See Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973); DOT Brief at 34; MVMA Brief at 26. When there is such a reversal of direction, there is always a greater burden of explanation, but it is a burden created by the agency action, not by the court. Thus, statements of the court of appeals referring to the absence of evidence supporting the agency's conclusions do not establish a different standard of review. They are made

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[49] *See Federal Communications Comm'n v. WNCN Listeners Guild*, 450 U.S. 582, 593-95 (1981). *See also Federal Communications Comm'n v. National Citizens Committee For Broadcasting*, 436 U.S. 775, 780 (1978); *United States v. Midwest Video Corp.*, 406 U.S. 649, 671-75 (1972) (all involving the "public interest, convenience and necessity" standard of the Communications Act of 1934, 47 U.S.C. §303 (1976)); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (involving the "unjust, unreasonable, unduly discriminatory or preferential" standard of the Natural Gas Act, 15 U.S.C. §717c (1976)); *American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 406-07 (1967) (involving the "just and reasonable" standard of the Interstate Commerce Act, 49 U.S.C. §1(3)-(5)).

Petitioners seem to rely on the fact that the statute contains a power to revoke standards as somehow indicating that the Congress was indifferent to whether the agency promulgated standards or not. The power to revoke, however, must be read in the context of the statutory purpose, and in aid of that purpose rather than in derogation of it. Petitioners' concept of a neutral statute is also at odds with 15 U.S.C. §1410a which requires the Secretary to act within 120 days upon petition of any person to either begin proceedings toward adoption of a standard or, if he denies the petition, to publish his reasons in the Federal Register.

in the *context* of that reversal, and in the *context* of a statute which also points in the opposite direction. Given that context, the court of appeals would have been remiss in its duty if it had accepted naked proclamations of uncertainty, no matter how often made. Naked uncertainty might well suffice for rescission of a regulation or a refusal to promulgate where there is "public interest" discretion, where there has been no reversal of direction or where there is a minimal record, but that is not *this* case.

The question before the court of appeals here was whether, acknowledging the deference due the agency, there were facts and circumstances which rationally explained its reversal of course and its apparent departure from the statutory purpose. This was the central issue, but it is one to which petitioners give precious little attention. The Federal Parties declare boldly that NHTSA engaged in a "thorough and reasoned assessment." DOT Brief at 29. But did it? This central question is scarcely addressed by petitioners except in such conclusory terms. The court of appeals had to address it. When it did, it came to the only conclusion possible.

2. One page of the court of appeals opinion (Pet. App. 51a) is cited by the petitioners probably more times than they cite to the record. *See, e.g.*, DOT Brief at 19, 29, 30 and 32; MVMA Brief at 19, 20 and 22. The court of appeals made two observations at that page: first, it said "[t]here may well be 'substantial uncertainty' about the seat belt usage rates that can be predicted if detachable belts are widely used;" and later in that same paragraph it went on to say that "it would be unreasonable for an agency to promulgate a regulation simply because of 'substantial uncertainty' that the status quo was any better." Pet. App. 51a. Juxtaposing these two observations, the petitioners contend that: (1) the court of appeals recognized that NHTSA's uncertainty was "reasonable"; and (2) the court of appeals recognized that the specific degree of uncertainty possessed by NHTSA at the time of rescission would have been an adequate basis for it to refuse to promulgate the requirement in the first instance.

These are completely erroneous characterizations of the opinion. At no point did the court of appeals state or even

imply that NHTSA's uncertainty was reasonable in the context of this case. The only "uncertainty" was the specific level of usage that could be achieved with detachable belts, but, as the court found, there was no rational reason to believe, given the record, that they "cannot lead to safety benefits that exceed their relatively small marginal costs." Pet. App. 51a-52a. Similarly, the court of appeals neither stated nor implied that given *this* statute and *this* record, NHTSA would have had an adequate basis for not issuing the passive restraint requirement in the first instance. In short, the term "substantial uncertainty" is a generalization. It cannot be lifted out of context solely to accomodate hypothetical, indeed unimaginable, fact situations.[50]

B. The Court Of Appeals Did Not Place Undue Or Erroneous Reliance On Post-Enactment Legislative Events.

The court of appeals opinion contains a detailed analysis of the lengthy and complex post-enactment legislative history of

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[50] Other characterizations by Petitioners are less relevant but equally erroneous:

a. The Federal Parties describe NHTSA's action as simply the withdrawal of a "burdensome" rule that "has not yet gone into effect," DOT Brief, at 33, a neutral, housekeeping action that got rid of some vague proposal for the future. The description of automatic crash protection as "burdensome" begs the obvious question of who would be burdened by a life-saving regulation, but the "not yet gone into effect" characterization is also inaccurate. Apart from its history in the early and mid-1970's, the automatic crash protection requirement was in effect from January 5, 1977 through its rescission effective December 8, 1981. Because of the manufacturers' insistence on long lead time requirements, the actual compliance dates were never reached, but the effectiveness of the regulation and the imminence of the compliance dates still led to the development, testing and actual production of several effective automatic crash protection technologies. By rescinding the requirement, NHTSA abandoned those technologies.

b. Similarly, the Federal Parties suggest that the court of appeals reversed a "presumption against regulation" implicit in the Safety Act. DOT Brief, at 31, n.26. The legislative history of the Safety Act suggests a contrary interpretation. Moreover, to the extent that an evidentiary presumption is involved, Section 7 of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976), logically places the burden on NHTSA (and the manufacturers) as the proponents of the rescission, much as they would carry the burden for initial promulgation. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 653 (1980).

the Safety Act as it relates to passive restraints. Pet. App. 32a-46a. While the court of appeals could hardly have chosen to ignore that history, it must be emphasized that the pre-enactment history and the plain meaning of the Safety Act define the limits of the discretion available to NHTSA. Nevertheless, the petitioners have seized upon the court of appeals analysis as being inappropriate in the first instance and erroneous in its conclusion. Neither criticism is well taken.

1. The court of appeals did not divine any mandate from the post-enactment history that otherwise would not exist. It did find that "a consistent administrative interpretation shown clearly to have been brought to the attention of Congress and not changed by it," while not barring rescission for rational reasons essentially confirmed the statute's "language of command." Pet. App. 47a, citing *Udall v. Tallman*, 380 U.S. 1, 17-18, *reh'g denied*, 380 U.S. 989 (1965) and *Kay v. Federal Communications Commission*, 443 F.2d 638, 646-47 (D.C. Cir. 1970). The deference owed an agency's prior construction of a statute "is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception. . . ." *United States v Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

2. Petitioners also contend that the court of appeals incorrectly analyzed the post-enactment history, that NHTSA always viewed the passive restraint requirement as a discretionary act and that Congress did not disagree. In other words, they have declared the post-enactment history to be a victory for the forces opposed to automatic crash protection. That it was not so is clear from the analysis in the opinion.[51]

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[51] Petitioners' descriptions of what transpired in the 1969-1976 period require some clarification:

a. From the very beginning, NHTSA recognized that "the interests of motor vehicle safety *demand* the prompt development and installation of passive restraint systems," 34 Fed. Reg. 11148 (July 2, 1969) (emphasis added), C.A. App. 2503, and that "[p]assive protection has become *imperative*. . . ." 35 Fed. Reg. 16927 (Nov. 3, 1970) (emphasis added), C.A. App. 2498. The reversal of the first automatic crash protection requirement on technical grounds in *Chrysler Corporation* put the requirement back a number

(footnote continues)

C. The Stay Entered By The Court Of Appeals On Behalf Of Petitioners Did Not Raise Any Justiciable Issues.

Petitioners contend that the court of appeals violated the dictates of *Vermont Yankee* by "ordering" a new compliance date of September 1, 1983, and by asking for evidence as to the propriety of a different date. A review of what the court of appeals actually did and did not do quickly disposes of this argument.

If the mandate of the court of appeals had issued shortly after its opinion, and assuming that mandate was not subsequently stayed or withdrawn, 1983 model year large and medium-size automobiles presently on sale would be required to have passive restraints, and all 1984 model year automobiles would have been required to have such devices. The court of appeals used its inherent equitable powers solely to stay the compliance dates *for the ostensible benefit of the petitioners.* This is a scenario not only devoid of procedural interference by the court of appeals, it is devoid of any injury to the complaining parties.

All of the above aside, the fact is that with the court of appeals' *sua sponte* withdrawal of its mandate, there are no currently effective compliance dates. In other words, the petitioners' procedural argument is not only misplaced, it is moot.

(footnote continued)

of years, but nothing in the 1969-76 period suggests a change in direction by either NHTSA or by Congress. Pet. App. 33a-36a. Even when NHTSA completed the regulatory actions triggered by the *Chrysler* decision by "revoking and reserving" the passive restraint requirement, it emphasized that it intended "to propose the long-term requirements for occupant crash protection, both for passenger cars and for light trucks and MPV's, as soon as possible." 40 Fed. Reg. 33977 (Aug. 13, 1975).

b. The notion that Secretary Coleman proposed a demonstration project in 1976 as an alternative to mandatory passive restraints is misplaced. He was "convinced, after a painstaking examination of the record, that passive restraints are technologically feasible, would provide substantially increased protection to the public in traffic accidents, and can be produced economically." C.A. App. 2073. Rather than readopting a standard that would be phased in over a number of years, he chose to *require* the industry, by contract, to provide passive restraints in 500,000 vehicles in the following model years. C.A. App. 2075. In other words, he chose a different and quite unique implementation strategy, but the direction remained unchanged.

CONCLUSION

The holding of the court of appeals should be affirmed.

Respectfully submitted,

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
JERRY W. COX
ZUCKERT, SCOUTT,
RASENBERGER & DELANEY
888 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 298-8660

Counsel for Respondents
National Association of
Independent Insurers,
Automobile Owners
Action Counsel, and
Eugene J. Meyung

**Counsel of Record*

Of Counsel:
LOWELL BECK, President
National Association of
Independent Insurers

DONALD L. SCHAFFER, Senior
Vice President, Secretary
& General Counsel
Allstate Insurance Companies

February 7, 1983

Nos. 82-354, 82-355 and 82-398

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.* and CONSUMER ALERT and PACIFIC LEGAL FOUNDATION and UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.* and NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO BRIEF FOR RESPONDENTS NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL AND EUGENE J. MEYUNG

RAYMOND J. RASENBERGER*
LAWRENCE C. MERTHAN
FRANK J. COSTELLO
JERRY W. COX
ZUCKERT, SCOUTT, RASENBERGER & DELANEY
888 Seventeenth Street, N. W.
Washington, D. C. 20006
(202) 298-8660

Counsel for Respondents National Association of Independent Insurers, Automobile Owners Action Council, and Eugene J. Meyung

* Counsel of Record

Of Counsel:
LOWELL R. BECK, President
National Association of Independent Insurers

DONALD L. SCHAFFER, Senior Vice President, Secretary & General Counsel
Allstate Insurance Companies

February 7, 1983

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H.R. 13228, 89th Cong., 2d Sess. (1966) (in pertinent part)	32a

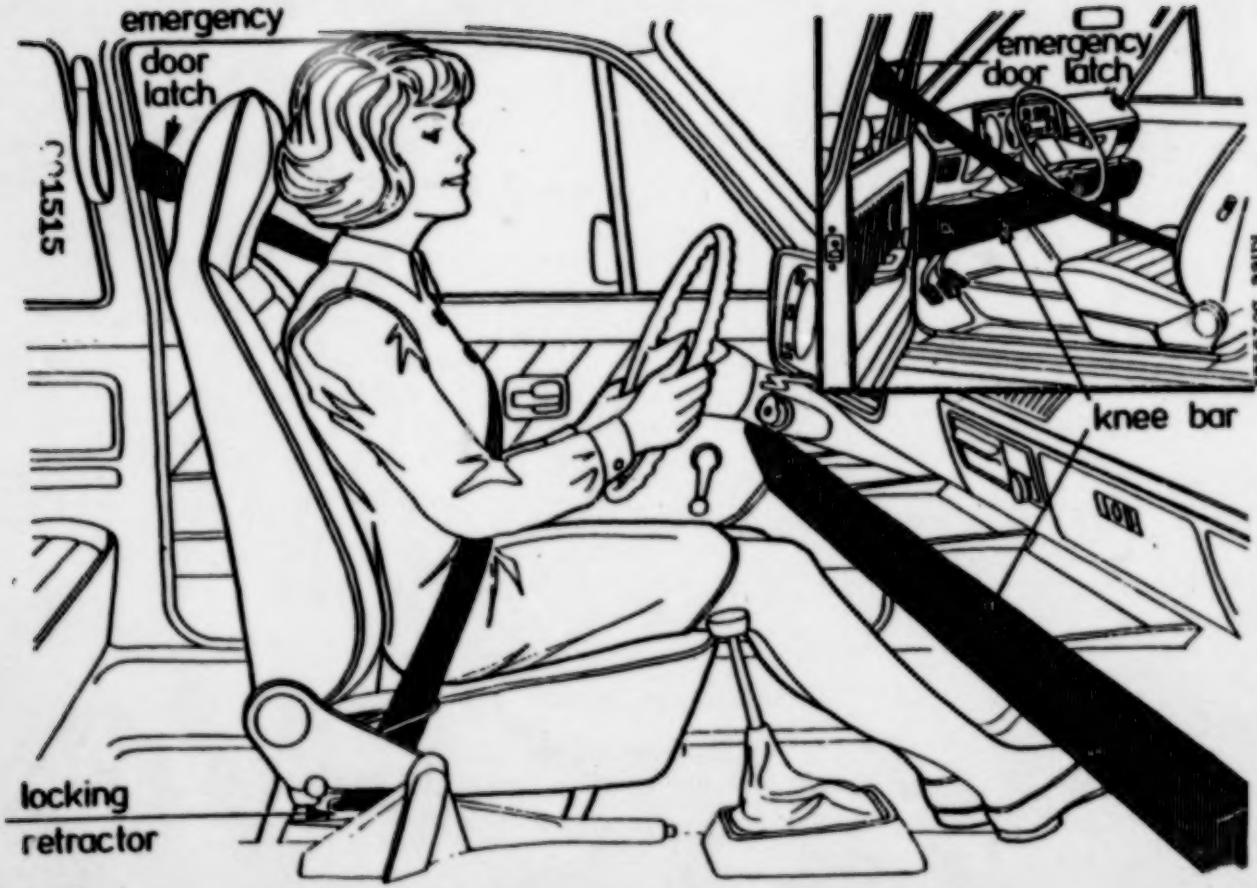


Figure 1.1. The Volkswagen Rabbit automatic restraint system.

Figure 1: Volkswagen Two Point Automatic Belt with Knee Bolster

Figure 2: 1980 Chevette Three Point Automatic Lap/Shoulder Belt (Non-Separable)

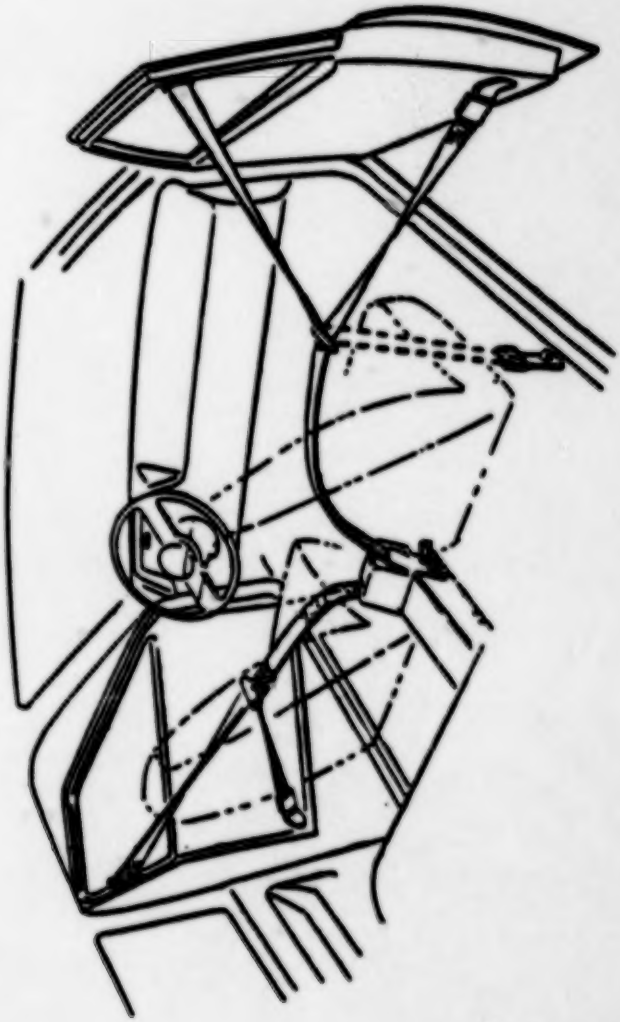
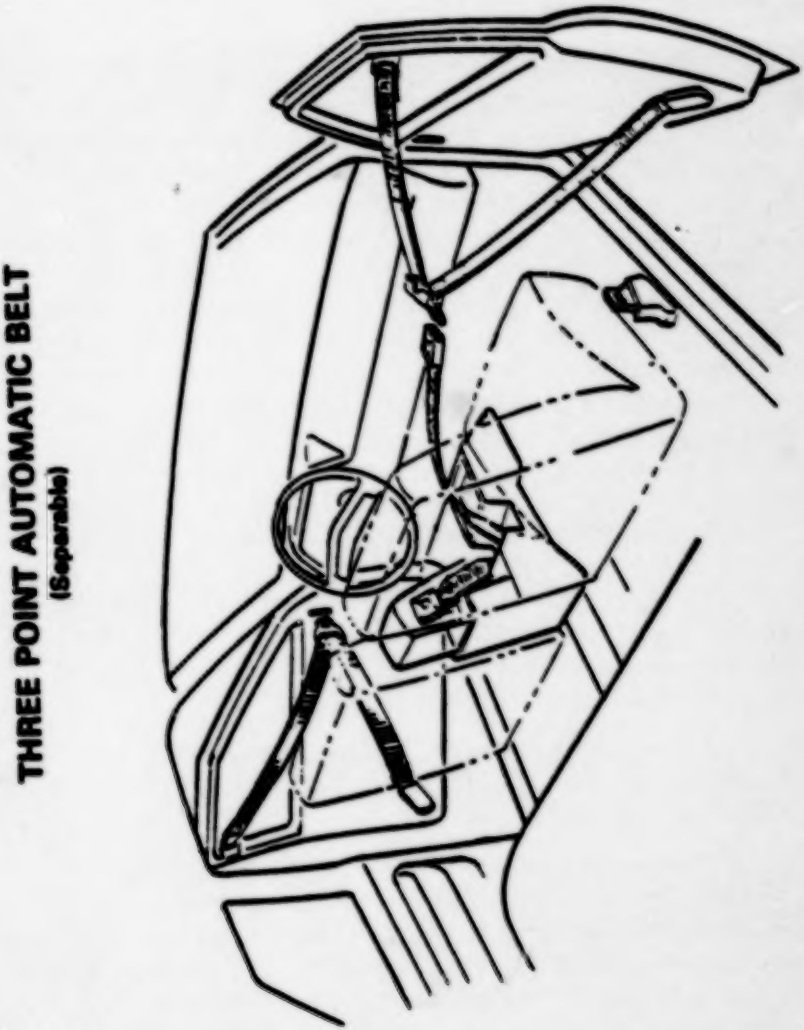


Figure 2
1980 Chevette Three Point Automatic Lap/Shoulder Belt
(Non - Separable)

Figure 3: Three Point Automatic Belt (Detachable)
(General Motors)



DEPARTMENT OF JUSTICE,

June 2, 1966.

Honorable WARREN G. MAGNUSON,
United States Senate
Washington, D.C. 20510

DEAR SENATOR MAGNUSON: At your request, the Department of Justice hereby offers its comments on the amendments to the draft bill on auto safety proposed by the automobile industry. These amendments in effect constitute a new draft bill. In the course of these comments we shall make various comparisons between this draft and S. 3005 in the form originally proposed by you. (We are commenting in a separate letter on proposed bill S. 3005.) For purposes of ready identification, in the following we shall refer to the latter as the "Administration bill" and to the amendments proposed by the industry as the "industry proposal."

A. SUMMARY OF THE INDUSTRY PROPOSAL

Under the industry proposal the Secretary would be required to establish regulations, in accordance with section 4 of the Administrative Procedure Act, making effective as a federal motor vehicle safety standard:

(1) any motor vehicle safety standard that has been adopted by the Vehicle Equipment Safety Commission (VESC), and

(2) any other motor vehicle safety standard, provided (i) he first allows such initial time (not exceeding two years from the date of enactment of the Act) as he considers reasonable for motor vehicle manufacturers to propose and for the VESC to adopt a particular motor vehicle safety standard, (ii) after determining with respect to a particular subject either that no standard exists or that existing standards or compliance therewith is inadequate, he then proposes an appropriate standard to the VESC, and (iii) the VESC fails to act upon the request within 180 days or such longer time as the Secretary specifies *or*

acts by issuing a standard which the Secretary determines is inadequate to protect the public against unreasonable risk of accidents or death or injury to persons resulting therefrom.

The Secretary would be required to follow a number of criteria enumerated in section 102(h) and to include in any order establishing safety standards findings of fact and conclusions on all relevant matters, presumably including compliance with the various criteria set forth. A standard would become effective no sooner than 180 days nor later than two years after the date on which it was issued, except that for good cause shown the Secretary might specify a later date.

The automobile manufacturers would be authorized individually or collectively to formulate and propose safety standards for consideration by the VESC and the Secretary. They would also be authorized "individually or collectively" to comply voluntarily with such a proposed standard until legally binding Federal or State standards covering the same subject matter have become effective. Joint cooperation in designing, testing, and producing motor vehicle or motor vehicle equipment for the purpose of complying with the standards proposed by them would also be authorized. However, the Act would provide that nothing therein contained should be deemed to exempt from the antitrust laws of the United States any conduct that would otherwise be unlawful under such laws.

Whereas the Administration bill would also authorize the Secretary to formulate standards to protect the public against accidents or death, injury, or *property damage* resulting therefrom, the industry proposal would provide that the authority of the Secretary to establish standards is limited to protecting the public against death and personal injury. His authority to formulate standards designed to protect the public against property damage caused by accidents would be eliminated.

Under the Administration bill it would be unlawful for any person to manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States any motor vehicle or item of motor vehicle equipment unless it is in conformity with standards

prescribed by the Secretary. However, under the industry bill it would only be an offense to "knowingly and willfully" perform one of these acts. The industry bill would also provide that sellers relying in good faith on a certificate provided by the manufacturer or importer to the effect that the vehicle or equipment is believed to conform to all applicable Federal safety standards shall not be liable under the Act. The proposed industry bill would also impose a $100,000 limitation upon the penalty which may be imposed for "any related series of violations" of the Act.

The Industry bill would also add a new requirement that before any violation of the title is reported by the Secretary to the Attorney General or any United States Attorney for institution of an injunction proceeding, the person against whom the proceeding is contemplated shall be given notice and opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding, and, except where knowing and willfull conduct is involved, such person shall also be given a reasonable opportunity to take corrective measures to achieve compliance.

A different standard for judicial review would be provided. Under the Administration bill findings of the Secretary as to facts, if supported by substantial evidence, would be conclusive. The industry proposal provides that findings of the Secretary with respect to questions of fact "shall be sustained if based upon a fair evaluation of the entire record of the proceedings on which the Secretary based his order."

There are a number of other respects in which the industry proposal differs from the Administration bill. These will be taken up in the course of our discussion of the industry bill.

The spokesman for the industry, John S. Bugas, Vice President of Fort Motor Company, sought to justify the amendments sponsored by industry in a statement before the House Committee on Interstate and Foreign Commerce on April 26, 1966, as follows:

"We urge only the adoption of reasonable amendments designed to assure state and industry participation in the

standard-setting process and to assure fair standard-setting procedures and criteria, a full opportunity for judicial review, and an enforcement system under which those who act in good faith and with due care are not punished, while the penalty for others is appropriate to the degree of blame that can be fairly charged to the person proceeded against.

"Finally, while the uncertainty of antitrust interpretations in this area continues to give us concern, we believe we can make progress within the framework of the present antitrust laws if the final bill explicitly recognizes the need for manufacturers to cooperate reasonably with one another in areas related to the limited purposes of developing and evaluating improved vehicle safety characteristics, formulating proposed minimum safety performance standards for adoption by the Federal Government and the states, and complying with those standards until legally binding standards are issued." (3-4)

In our opinion, the industry proposal suffers from at least six basic shortcomings.

First, by imposing requirements for working through the VESC the bill would in practice delay the introduction of new safety devices and leave the timing on introduction of new devices largely in the hands of the industry.

Second, it would require the Secretary to act in accordance with criteria which in some instances are unnecessary and in others are overly protective to industry interests and fail to take adequate account of the importance of rapid employment of new safety devices.

Third, the proposal might grant an implied immunity from the antitrust laws for various activities which should not be immunized from antitrust scrutiny.

Fourth, amendments relating to judicial courses of action taken by the Secretary and the procedure to be followed by the Secretary require unnecessarily cumbersome and time-consuming proceedings that can hamper the effectiveness of the standards.

Fifth, the proposal would severely narrow the category of acts prohibited by the statute and reduce the penalties to be imposed for violations.

Sixth, it would limit the power and discretion of the Secretary in a number of undesirable ways, most important of which would be elimination of his power to adopt standards to protect against property damages caused by accidents.

(1) *The Required Reference to VESC:* The industry proposal would require prior action by the VESC before the Secretary would be permitted to promulgate standards. The Secretary would be limited to establishing standards previously adopted by the VESC; or standards previously recommended by the Secretary to the VESC upon which it had failed to act; or standards after VESC had acted by adopting standards determined by the Secretary to be inadequate. Before he would even be permitted to recommend a standard on a particular subject to the VESC, the Secretary would be required to allow such initial time (not exceeding two years from the date of enactment of the Act) as he considered reasonable for motor vehicle manufacturers to propose and for the VESC to adopt a particular motor vehicle safety standard. Section 102(d),(e).

Since the Secretary would be authorized to establish other standards on a particular subject only if he determined there were no existing standards or existing standards pursuing inadequate, he might well be barred from pursuing any standard on a given subject except a standard adopted by the VESC, unless he were willing to find that the VESC standard was inadequate. Section 102(d).

In support of its proposed modification of the Administration bill to require prior action by the VESC before the Secretary could promulgate standards, the industry spokesman argues that it is desirable to bring both the states and the automobile industry into the standard-making process.

Obviously the states and the industry undoubtedly have certain expertise which should not be ignored. However, it is not necessary to adopt the industry proposal to accomplish this purpose. The Administration bill in its present form already provides for state and industry participation in section 105.

The industry proposal requires more than prior consultation by the Secretary with the states and industry; prior *action* by the automobile manufacturers and the VESC is required before the Secretary would be permitted to act.

To appreciate the possibilities for delay in the formulation of standards and introduction of safety devices which this scheme would permit, it is necessary to consider how the VESC operates. The Vehicle Equipment Safety Compact does not in itself contain standards for safety equipment. Rather, it sets up the procedures and machinery for interstate cooperation in the formulation of such standards. The compact establishes an interstate agency, the "Vehicle Equipment Safety Commission," consisting of one member designated by each party state. The Commission is empowered to recommend "rules and regulations or codes embodying performance requirements or restrictions" for items of motor vehicle equipment.

The compact outlines the steps for the Commission to follow in developing its recommendations. First, it must study the need for establishing or changing performance requirements for an item of safety equipment. The study must take into account research and test data available from any source. For this purpose, the Commission may "collect, correlate, analyze and evaluate" research and tests carried on by other agencies, public and private. But except for such "library-type" research, it is not authorized to carry on any research and testing of its own. It may contract for research and testing, but only if requested to do so by a state or governmental agency, and then only if the requesting agency provides the necessary funds. The Commission may not accept private funds for any purpose.

On the basis of its study of need, the interstate agency must publish a report. No less than sixty days later, it must hold one or more public hearings.

Finally, after these steps are completed, "and with due regard for standards recommended by appropriate professional and technical associations and agencies," the Commission may issue recommended rules, regulations or codes.

Party states are obligated to consider the rules, regulations or codes issued by the Commission, but they are *not* obligated to accept them. One of the two alternative methods of adoption requires affirmative action by the state legislature for the rule, regulation or code to take effect. The second alternative method is adoption by administrative action of a party state's motor vehicle agency. If a state chooses this alternative, its motor vehicle agency must adopt the rule, regulation or code within six months. The administrative agency may "decline to adopt" but only after public hearing, a specific finding that a variation from the Commission's recommendation "is necessary to the public safety," and a recital of the reasons on which the finding is based. Forty-four states and the District of Columbia are now members of the compact. In all but a few of the member states the enabling legislation provides that the legislature must pass upon standards proposed by the VESC.

We may only guess how long the adoption of motor vehicle safety standards by the VESC might take, since it has never yet adopted one, although Congress authorized the formation of interstate compacts in the field of traffic safety by passage of the Beamer resolution in 1958 and the VESC was organized in 1963. Surely, however, the study of need, publication of a report, holding of one or more hearings after an interval of at least sixty days, consideration of standards recommended by appropriate professional and technical associations and agencies, and finally formulation of a standard would consume a very considerable period of time. Moreover, since the proposed act would authorize the automobile manufacturers collectively to propose standards to the VESC and the compact requires the VESC to consider standards recommended by "appropriate professional and technical associations and agencies" before acting, the automobile manufacturers would be able to some extent to influence the timing on introduction of new safety devices.

The industry proposal would require the Secretary to allow such initial time (not exceeding two years from the date of enactment of this Act) as he considers reasonable for motor vehicle manufacturers to propose and for the VESC to adopt a

particular motor vehicle safety standard. Presumably, this means the Secretary must allow reasonable time for the procedure which has been outlined to be carried out. It may be somewhat optimistic to think that this procedure could be carried out even within the two-year maximum time limit which would be imposed. In any event the Secretary would have to allow reasonable time for the VESC to act on its own before he would even be permitted to propose an appropriate standard to the VESC for its consideration, a step which would be a prerequisite to promulgation of a federal standard by the Secretary. Although the industry proposal would provide that the Secretary could request the VESC to act upon his proposal within 180 days or such longer time as he might specify, it would appear that the VESC compact, the organization's legally binding constitutional document, would require it to adhere to the time-consuming procedure which has been outlined above. If the VESC had not previously recommended a standard on the particular subject, it would probably have to conduct the entire proceeding. Even if it had previously studied the particular subject, it would, at a minimum, have to publish a new or amended report, hold new hearings after allowing a sixty-day interval, and consider the opinions of appropriate professional and technical associations and agencies before acting on the Secretary's proposal. It seems extremely unlikely that such a procedure could be carried out within 180 days or anything approximating this period of time, and the proposed scheme appears to be not only unnecessary and undesirable but completely unworkable if one assumes that the Secretary would request the VESC to act within the 180-day period. The Secretary would no doubt be under heavy pressure to exercise the descretion which the industry bill would give him to allow a longer period within which the VESC could respond to his proposal.

In order for the Secretary to act under the industry proposal, however, not only would it be necessary to carry out these VESC proceedings, but the Secretary would then have to hold an APA section 4 proceeding as well. It is easy to envision it requiring five years or more before the Secretary is able to promulgate enforceable standards, with the automobile manufacturers themselves controlling the timing to a great extent.

Although Mr. Bugas stated before the House Committee on Interstate and Foreign Commerce that the amendments proposed by the industry "would involve no delay in the development and establishment of national safety standards," we believe it is obvious that this is far from the case.

In his remarks upon signing Proclamation 3718, declaring the week of May 15 as National Transportation Week, President Johnson stated that the Highway Safety Act of 1966 "will establish a program of strict safety standards for our automobiles." "The alternative to Federal standards," he said, "is unthinkable: 50 different sets of standards for 50 different States." The industry proposal, while it would not result in 50 different sets of standards, would permit differences among the States to delay for a very long period of time the introduction of federal standards.

One additional respect in which power might be taken from the Secretary and transferred to the VESC under the industry proposal warrants comment. The industry proposal, in section 102(d), would *require*, rather than authorize, the Secretary to establish as a motor vehicle safety standard any standard issued by the VESC which he found appropriate and necessary to accomplish the purposes of the Act. Since under that section the Secretary would be authorized to establish other standards only if any existing motor vehicle safety standard is inadequate, he would probably be barred from issuing any standard except the standard adopted by the VESC, unless he were willing to find that the VESC standard was inadequate. The Secretary might well believe that another standard was preferable to the standard recommended by the VESC, although he might not be prepared to determine that the standard recommended by the VESC was inadequate. In this situation he would be precluded from adopting the preferable standard.

The net effect of these disabilities of the proposed procedure is that in the name of desiring to allow the states to play a role, the hands of the Secretary would be severely tied. It is significant that the present industry proposal does not call for strengthening the VESC and opening it to federal participation.

At the hearings on S. 3005, when the industry proposed a joint voluntary action program with frequent consultations with Congress, the Secretary, the VESC and other governmental agencies, the industry spokesman, John S. Bugas, Vice President of Ford Motor Company, testified that the VESC presently has "a very small staff, inadequate in our opinion," (965) and "as it exists today, really cannot do this job." (1025) He indicated that the VESC has been concerned primarily with matters relating to driver safety, including driver licensing, registration, vehicle inspection, and law enforcement. In response to a question by Chairman MAGNUSON whether the VESC had ever discussed the designing of automobiles "in a way that might show an activity or interest in how a car is designed for safety reasons," he answered, "To my knowledge, they have not." (967) Mr. Bugas suggested that "one of the basic defects in VESC has been its inability, for whatever reason I don't know, its inability to finance its operations." (1027) "The State Commissioners," he stated, "frequently don't have money enough to go to a meeting." Senator HARTKE pointed out that even were the Federal government to help finance the VESC, since many State legislatures only meet every other year, it might be three years before there would be matching funds from many State organizations. (1028) These statements contrast sharply with the testimony of Mr. Bugas before the House Committee on Interstate and Foreign Commerce that: "The Vehicle Equipment Safety Commission is already authorized to issue vehicle safety standards for adoption by the states, *and no change in its present structure would be required.*"

The industry proposal would also amend section 105 of the bill, which authorizes the Secretary to cooperate with federal agencies, state or other public agencies, businesses, universities or other institutions in the planning or development of safety standards and inspection and testing methods, to specifically refer to the VESC as one of the state agencies which might be consulted and manufacturers of motor vehicles and motor vehicle equipment as businesses which might be consulted. These are logical parties with whom the Secretary might consult, and he would clearly have the power to cooperate with

these groups under the bill as presently written. Therefore, an amendment which would specify these two groups in particular seems unnecessary.

(2) *The Criteria for the Secretary's Action:* A second critical shortcoming in the industry proposal is that at least some of the criteria which it would require the Secretary to follow in establishing standards are overly restrictive, while others appear to be unnecessary and can serve best to breed pointless litigation. (Section 102(h).)

Among other things, the Secretary, in order to establish a standard, would be required to make findings of fact that it was "consistent with the continuation or adoption by motor vehicle manufacturers of efficient designing, engineering, and manufacturing practices, and with innovation, progressiveness, and customary model changes in the automotive industry." (Sec. 102(h)(2).) This criterion suggests that the introduction of safety devices, however urgent the need for them might be, could not be allowed to interfere with the customary cycle of the industry. It appears to be so interpreted by the industry. The Washington Post on May 13 reported an industry spokesman to have stated that under this provision the auto makers could not be expected to make "basic changes" such as an impact-absorbent front end for all models in a single year. The spokesman is reported to have said further that the industry is accustomed to basic model changes only every 3-4 years. In some instances, the urgency of the need for new safety devices may justify some disruption of the present cycle. The balancing of the urgency of the need for new devices against whatever disruption may result is a matter appropriately left to the Secretary. Moreover, while it might appear reasonable that a "standard should be consistent with * * * innovation [and] progressiveness," Mr. Bugas testified before the Senate Commerce Committee that the mere authorization of the Secretary to set standards would interfere with innovation and progressiveness. This suggests the type of litigation these broadly phrased standards might invite.

Accordingly, we oppose section 102(h)(2) in toto.

Another criterion, that of section 102(h)(1), also appears to be weighted against the desirability of action and contains general terms that may breed unwarranted challenges to the authority of the Secretary and to the effectiveness of the standards he sets. This provision requires that "the benefit to be derived by any * * * safety standard should be *clearly* warranted in the light of *all relevant factors.*" Conceivably, in a similar manner, the requirement of 102(h)(3) that costs be commensurate with "the benefit to be achieved" can raise serious problems as to evaluation of the benefits of safety. While we do not find particularly objectionable the criteria set forth in 102(h)(4) and 102(h)(5), the above problems presented by the articulation of these specific criteria lead us to prefer the approach taken by the Administration bill.

Under the Administration bill, the Secretary would have authority to establish "appropriate" Federal safety standards if he decides that there is a "need" for standards to achieve "adequate" motor vehicle safety to protect the public against "unreasonable" traffic risks. The Administration bill also requires a "performance" standard which is "practicable," "which meets the need for motor vehicle safety," and "which provides objective criteria on which the public may rely in assuring motor vehicle safety" (Sec. 101(b)). These criteria do not pose any problem of unconstitutional delegation of authority and have the virtue of avoiding the potentiality of unduly tying the Secretary's hands that the proposed criteria have. If, however, it is concluded that specific criteria are necessary they can be more appropriately written than those proposed by the industry.

(3) *The Unwarranted Extension of Antitrust Immunity:* A third danger posed by the industry proposed bill is that it might well create an unwarranted implied immunity from the antitrust laws.

The industry proposal authorizes and encourages automobile manufacturers (a) to collaborate in formulating standards; (b) to collaborate in designing, testing and producing vehicles

and equipment relating to such standard; and (c) to agree with each other to comply with standards proposed to the VESC or the Secretary before these standards are adopted.

In our judgment this statutory authorization and encouragement is unnecessary and unwise. The antitrust laws do not prevent the achievement of desirable progressiveness in the design and manufacture of safety equipment and vehicles. There is reason to predict that, in fact, competition among the very large and able companies that comprise the automobile industry can accelerate the development of safety devices. The collaboration authorized by the industry proposal, however, may well have a braking effect upon the development of safety devices.

For example, section 102(c)(3) would authorize the automobile manufacturers to agree to comply voluntarily with standards proposed to the Secretary or VESC before the government adopted standards. The danger in allowing the manufacturers to agree on minimum standards is that in practice these standards might well be regarded by the industry as absolute standards, which are not to be exceeded. Nor is it clear why agreements are necessary in this area. If, having proposed a standard, companies unilaterally determine that public opinion requires that they comply with or exceed that standard, antitrust liability is not a real threat.

Second, section 102(c) would authorize the manufacturers to work jointly "in designing, testing, and producing motor vehicles or motor vehicle equipment" for the purpose of developing, evaluating or complying with proposed standards. Some of this activity might well raise serious problems under the antitrust laws—such as joint production of *motor vehicles* to comply with proposed standards—in effect a partial merger in an industry already characterized by extreme concentration.

On the other hand, other activity covered by the provision, such as joint testing of new safety devices, would not ordinarily raise antitrust problems. The point is, however, that in an industry of so few participants, each of which is a large corporation with substantial resources, the valid need for

collaborative action, weighed against the possible adverse consequences of such collaboration, does not warrant any special protection from ordinary antitrust principles. Such principles are not unduly inhibiting; they do not threaten to impede progress in the development of safe cars. The *Hearr* doctrine affords ample room for consultation among the companies in invoking the governmental processes. Consultation with the Antitrust Division under the Business Review Procedure can assure the industry of the safety from antitrust prosecution of any collaborative effort.

Although the industry amendment would provide that the statute would not make lawful anything otherwise forbidden by the antitrust laws, such language is not an adequate safeguard. In a rule of reason situation a court could not help but be affected to some extent by the fact that the statute explicitly authorizes and encourages cooperation in the production of motor vehicles and equipment. Similarly, the court could not help but be impressed by the fact that the statute authorizes and encourages the members of the industry to agree to comply with the standards they are proposing even before these standards are adopted. If, as may well be the case, most of the antitrust problems raised by such collective action are not of a *per se* variety, the fact of legislative authorization and encouragement would undoubtedly affect a court's disposition of the anti-issue, despite any explicit disclaimer. At this point, it is not at all clear from either a competitive or a safety point of view that this type of collaborative effort is essential or wise.

(4) *The Inappropriate Standards of Judicial Review:* The industry proposal would make various amendments relating to judicial review of action taken by the Secretary and the procedure to be followed by the Secretary. These amendments are contained in proposed sections 102(i) and 103.

The industry proposal would amend section 103(a)(3) to substitute a new standard for judicial review of determinations made by the Secretary. Under the Administration bill findings of the Secretary as to facts, if supported by substantial evidence, would be conclusive. The industry proposal provides that findings of the Secretary with respect to questions of fact "shall

be sustained if based upon a fair evaluation of the entire record of the proceedings on which the Secretary based his order."

This new standard for judicial review represents an attempt to obtain a form of trial de novo in the Courts of Appeals, which would review the orders of the Secretary. Such review would be inappropriate and extremely burdensome on the Courts of Appeals, which are accustomed to reviewing determinations of fact under a "substantial evidence" test. The latter test is the one generally contained in statutes providing for court review of decisions or orders of regulatory agencies. See, *e.g.*, 15 U.S.C. 21(c) and 16 U.S.C. 825(1), relating to FTC and FPC orders. We see no reason why similar language should not be used here.

The industry proposal would also amend section 103(a)(3) to provide specific authorization to the reviewing court to stay the order of the Secretary pending final determination of the review proceedings, and would make jurisdiction in this respect, as well as to affirm or modify the Secretary's order, exclusive. This amendment seems undesirable in two respects. First, the specific authorization to the reviewing court to stay the Secretary's order is unnecessary, since such power, subject to appropriate limitations, is already given to the reviewing court under section 10(d) of the APA Act (5 U.S.C. 1009(d)). While the industry proposed statutory authorization is unnecessary, it might also have the undesirable effect of removing the limitations on the power to grant stays contained in section 10(d), since these limitations are not contained in the proposed statutory amendment. Second, by making the court's jurisdiction to stay the Secretary's order exclusive, this provision might take away the power which the Secretary otherwise would have under section 10(d) to postpone the effective date of action taken by him pending judicial review. It is probably desirable that the Secretary retain this power.

Section 103(a)(3) would also be amended by the industry proposal to provide that, "The Court shall not sustain the order of the Secretary if he failed to comply with *any* requirement imposed upon him by section 102." Section 10(e) of the APA Act provides that the reviewing court shall hold unlawful and

set aside agency action which is not in "observance of procedure required by law." The industry provision might invalidate action of the Secretary taken in substantial compliance with the specified procedure but with some minor deficiency not prejudicial to any party, whereas the provision of the APA Act would not. Accordingly, we oppose all the amendments which the industry proposal would make to section 103(a)(3).

The industry proposal would also provide in section 102(i) that the Secretary "shall base each such order upon a fair evaluation of the entire record which is before him pursuant to such section 4, and he shall set forth in such order findings of fact and conclusions on all relevant matters."

This amendment is undesirable. Because of its reference to a record and findings of fact, it may be intended to require the Secretary to conduct a formal *adjudicatory* proceeding, in accordance with sections 7 and 8 of the APA Act (5 U.S.C. 1006, 1007), rather than a *rule making* proceeding. The rule making proceeding apparently is contemplated by the Administration bill, since the Secretary is authorized to promulgate standards in accordance with section 4 of the APA Act (5 U.S.C. 1003), which prescribes the rule making proceeding. We prefer the flexibility of the Administration bill and suggest that the agency should retain the discretion, provided by section 4 of the APA Act, to determine whether to hold formal hearings with opportunity for cross-examination.

(5) *The Unwarranted Narrowing of Prohibitions:* The industry proposed amendments to sections 107, 108, 109 and 110 would severely restrict the acts which would be prohibited by the statute and reduce the penalties which might be imposed for violations. In a number of respects these changes may impair the efficiency of the proposed legislation.

(a) Under section 107(a)(1) of the Administration bill it would be unlawful for any person to manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States any motor vehicle or item of motor vehicle equipment unless it is in conformity with such standards as are prescribed by the Secretary. This would be a strict liability standard. The

industry proposal would only prohibit "knowingly and willfully" selling motor vehicles or equipment failing to meet federal standards. The standard of liability would be that of intentional torts.

Especially in view of the fact that the Administration bill does not in the version we have studied provide for criminal sanctions, an intentional tort standard seems far too permissive. Under the industry proposal manufacturers may not be found in violation of the act although they sold vehicles in reckless disregard of whether they complied with federal standards.

Unlike S. 3005, the Brake Fluid and Seat Belt Standards legislation, which only prohibit knowing and willful violations, are criminal statutes.

We have no objection to the certification device for protecting sellers who are assured by the manufacturer or importer of compliance with safety standards. Section 107(a)(3), b(1).

(b) The industry proposal would amend section 108(a) to place a $100,000 limitation on the penalty which could be imposed for any "related series of violations" of the Act. It would also delete the provision that a violation of section 107 or regulations issued thereunder shall constitute a separate violation with respect to each motor vehicle or item of motor vehicle equipment. We are opposed to these amendments. While some overall limitations may be desirable for a related series of violations, a limit of $100,000 would seem unreasonably low and would not act as a strong deterrent. Deletion of the provision defining what constitutes a separate violation of the act would leave this matter uncertain. Since the definition in the Administration bill appears to be a reasonable one, we oppose the deletion.

The industry proposal would also eliminate the seizure remedy provided in section 110(a). This is undoubtedly an extraordinary remedy to be used rarely. It may be desirable to provide such a remedy, both to have it available for an extraordinary situation and because it may act as a powerful deterrent to violation of the act. However, if adequate deterrents are otherwise provided, we see no strong need for the provision.

(c) A new section 107(c) would provide that nothing in the act shall be construed to require the Secretary to report for imposition of a civil penalty or institution of injunction proceedings minor violations of the act whenever the Secretary believes that the public interest will be adquately served by a suitable written notice or warning. No definition of what would constitute a "minor violation" is given. This provision seems unnecessary but if it is retained "minor violations" should be defined.

A new section 109(a) would provide that before any violation of the title is reported by the Secretary to the Attorney General or any United States Attorney for institution of an injunction proceeding, the person against whom the proceeding is contemplated shall be given notice and opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding, and, except where knowing and willful conduct is involved, such person shall also be given a reasonable opportunity to take corrective measures to achieve compliance. This would permit a period of delay before an injunction could be obtained, although swift action may be necessary in the interest of public safety.

The report submitted with the industry draft bill states that this provision is consistent with section 305 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 335). However, that section calls for notice and hearing "before any violation * * * is reported * * * for institution of a *criminal* proceeding * * *." (Emphasis supplied.) The courts, moreover, have construed this provision to be inapplicable in a civil action for injunction. The report also cites section 9 of the Administrative Procedure Act, which offers interested parties a reasonable opportunity to take corrective measures to cure a violation before proceedings can be instituted. However, that section only applies to proceedings relating to revocations and suspensions of licenses.

We would generally not favor imposition of criminal penalties for violation of the Act. Were criminal sanctions created, the statute might have to be narrowed in the respects we have noted, and it would also undoubtedly receive a narrower judicial construction. There would also be some

difficulty in determining on which individuals criminal penalties should be imposed. Under the antitrust laws criminal sanctions are imposed upon individuals who have been participants in conspiratorial activity. The individuals responsible for noncompliance with safety standards, however, would not be as readily identifiable.

(6) *Other Limiting Amendments:* A number of other amendments proposed by industry would limit the power and discretion of the Secretary in various ways.

(a) The authority of the Secretary to establish standards would be limited to protecting the public against death and personal injury, whereas the Administration bill would also authorize him to formulate standards to protect against property damage. See sections 2, 101(a), 102(c)(2) and 104(a). In support of this limitation, the industry argues only that standards to protect against death or personal injury may be inconsistent with standards to protect against property damages. While it is true that these goals may be inconsistent in some circumstances, it is clear enough that priority should be given to protection against death and personal injury in such cases. Surely, the fact that the Secretary's ability to protect against property damages would be limited to some extent by the priority to be given to protecting life and person is no reason for denying him the power to protect against property damages where this can be accomplished consistent with other aims.

(b) Section 102(g) of the industry bill would require the Secretary to comply with the same procedure in amending or withdrawing a standard as in originally issuing one. The Secretary would first have to request the VESC to issue such an amendment or withdrawal. It seems particularly undesirable to limit the Secretary's power to withdraw a standard and to require such time-consuming proceedings, since experience may demonstrate a standard to be inadequate or, perhaps, even harmful.

(c) The industry proposal would eliminate from the present section 111(b) the requirement that manufacturers establish and maintain such records as the Secretary may reasonably require and also the provision that manufacturers

shall permit officers designated by the Secretary to inspect appropriate books, papers, records and documents. These provisions in the Administration bill are important means for the Secretary to ensure compliance with the Act and should not be eliminated.

(d) Section 113 of the Administration bill would require the Secretary to utilize the services, research, and testing facilities of other departments and agencies to the maximum extent practicable in order to avoid duplication in facilities and services. The industry proposal would add to this provision the requirement that the Secretary utilize the facilities of competent private agencies to the maximum extent practicable. It would be undesirable to limit the flexibility of the Secretary in this manner. He should be free to use private facilities to the extent he determines to be desirable. Moreover, in this connection we believe the Administration bill should clearly state that the Secretary has power to undertake research and development of experimental automobiles. In view of the highly concentrated structure of the industry this additional source of research and innovation would be valuable.

(e) Section 102(b) [102(f) of the industry bill] would be amended to require the Secretary to give due consideration to the criteria of Section 102(h), discussed at length in part (2) above, in determining the effective date for standards. Our comments earlier with respect to these criteria apply here as well.

(f) The industry proposes to add a new section 114 which would provide that in a civil action for infringement of a patent of the United States where the defendant establishes that the infringement was necessary for compliance with a federal motor vehicle safety standard, relief shall be confined to a reasonable royalty for making or using the patented invention. While it appears to be intended that this provision apply to all patents, "patents of the United States" might be interpreted to mean patents owned by the United States Government, in which case the provision would have very limited effect. Perhaps a different description of the patents covered should be chosen.

This provision can unnecessarily dull the incentive for any member of the industry or any independent part manufacturer to push research. The possibility of a new defense in infringement actions, which will be passed upon by a number of different courts and may lead to diverging conclusions as to the "necessity" for licensing, would increase patent litigation and would substantially qualify the expectation for rewards of prospective patent holders.

On the other hand, we recognize that there may be situations in which the advancement of safety requires that a patented invention be available generally on a reasonable royalty basis. We believe that if the Secretary should promulgate a standard that requires the use of a device for which there is but one patent holder, he should be empowered and required to provide for compulsory licensing of that patent on a reasonable royalty basis on the request of any prospective licensee. If alternative patented devices are available, he should be authorized in his discretion (upon his determination that availability at a reasonable cost of equipment needed for compliance with the safety standards so requires) to provide for compulsory licensing on a reasonable royalty basis of each such alternative patent on the request of any prospective licensee.

(g) Under section 102(b) of the Administration bill, if federal standards were in effect with respect to a motor vehicle or item of motor vehicle equipment, state standards with respect thereto would be null and void.

The industry section 102(f) would preempt state standards only if they differ from federal standards, consistent with the approach followed in the Tire Safety Bill.

Such an amendment seems desirable and may be necessary to enable the states to impose standards for used cars.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

RAMSEY CLARK
Deputy Attorney General

H. R. 12548

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 3, 1966

MR. MACKAY introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To amend Public Law 660, Eighty-sixth Congress, to establish a National Traffic Safety Agency to provide national leadership to reduce traffic accident losses by means of intensive research and vigorous application of findings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 14, 1960 (Public Law 660, Eighty-Sixth Congress), as amended, is amended to read as follows: That this Act may be cited as the National Traffic Safety Act.

"FINDINGS AND STATEMENT OF PURPOSE

"SEC. 2. (a) The Congress finds (1) that traffic accidents are the major cause of death of young people and, next to heart disease, cancer, and stroke, the principal cause of death and disability in the United States and are a menace to the public health and welfare; (2) that traffic accidents cause the American people direct financial losses each year in excess of $9,000,000,000 and seriously disrupt the economic life of the Nation and impede the orderly flow of commerce; (3) that many factors contribute to traffic accidents—such as the lack of uniform traffic highway signs and highway design, and the lack of adequate standards of safety incorporated into motor vehicles—and these factors may be minimized or eliminated by a national effort for traffic safety; (4) that the attainment of

maximum traffic safety requires vigorous Federal, State, and local action and a national agency will assist in obtaining such action; and (5) that a national program must be enacted by Congress in order to carry out its constitutional mandate to promote the general welfare and regulate commerce.

"(b) It is, therefore, the purpose of this Act to the extent of death, injury, and loss of property resulting from traffic accidents by providing the means for a counterattack on the problem through the establishment of a National Traffic Safety Agency headed by a highly qualified Administrator; the establishment of a National Traffic Safety Center which shall bring together public and private information and research; and through a national program for traffic safety which shall seek to achieve a uniform national traffic safety environment by means of the vigorous application of knowledge as to the principal causes of traffic accidents, deaths, and injuries.

* * *

"ESTABLISHMENT OF THE NATIONAL TRAFFIC SAFETY AGENCY AND THE OFFICE OF NATIONAL TRAFFIC SAFETY ADMINISTRATOR

"SEC. 4. (a) The Secretary shall carry out the provisions of this Act through a National Traffic Safety Agency (hereinafter referred to as the 'Agency'), which he shall establish in the Department of Commerce. The Agency shall be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be compensated at the rate prescribed for level III of the Federal Executive Salary Schedule established by the Federal Executive Salary Act of 1964. The Administrator shall be a citizen of the United States, and shall be appointed with due regard for his fitness to discharge efficiently the powers and duties delegated to him pursuant to this Act. The Administrator shall have no pecuniary interest in or own any stock in or bonds of any enterprise involved in (1) manufacturing motor vehicles or

motor vehicle equipment, or (2) constructing highways, nor shall he engage in any other business, vocation, or employment. The Administrator shall perform such duties as are delegated to him by the Secretary.

"ESTABLISHMENT OF NATIONAL TRAFFIC SAFETY CENTER"

"(b) The Secretary shall establish, within the Agency, a National Traffic Safety Center (hereinafter referred to as the 'Center'). The Center shall consist of such library, laboratory, research and testing facilities as may be necessary to examine every facet of the traffic accident phenomenon in order to find the principal causes of traffic accidents and injury and to identify the most effective and practical methods for their prevention.

"ESTABLISHMENT OF NATIONAL TRAFFIC SAFETY PROGRAM—DUTIES OF THE SECRETARY OF COMMERCE

"SEC. 5. In order to carry out the purposes of this Act, the Secretary is authorized to—

"(1) conduct research and engineering studies, including, among others, studies of pertinent laws and regulations, motor vehicle safety design, driver training, accident reporting, highway construction, and highway signs, signals, and controls designed to improve traffic safety and establish national traffic safety standards;

"(2) collect, interpret, and publish data, statistics, and other information relating to traffic safety, establish and maintain library reference and public information services, and publish, on a regular basis, periodic consumer traffic safety bulletins for motorists;

"(3) promote and encourage the enactment of uniform State traffic and driver licensing laws and the uniform enforcement of such laws and encourage the several States

to enter into interstate compacts promoting highway traffic safety as authorized by the joint resolution of the Congress approved August 20, 1958, as amended;

"(4) develop and establish national traffic safety standards pertaining to the various elements in the total traffic environment and certify compliance with such standards pursuant to the provisions of this Act;

"(5) employ experts and consultants, or organizations thereof to assist him in carrying out his functions under this Act, as authorized by section 15 of the Administrative Expenses Act of 1946 (5 U.S.C. 55) to compensate individuals so employed at rates not in excess of $100 per diem, including travel time, while away from their homes or regular places of business, travel expenses as authorized by section 5 of such Act (U.S.C. 73b-2) for persons in the Government service employed intermittently, while so employed;

"(6) negotiate contracts with, or make grants to educational institutions, scientific organizations, and industrial and engineering firms;

"(7) to the maximum extent practicable act in concert with the several States, local governments, nonpublic institutions and organizations;

"(8) issue necessary regulations and reports authorized by this Act; and

"(9) take such other actions as he determines will promote traffic safety in the United States.

"NATIONAL TRAFFIC SAFETY STANDARDS

"SEC. 6. (a) The Secretary shall establish, and publish in the Federal Register, not later than six months after the effective date of this Act, regulations prescribing national traffic safety standards.

"(b) The standards shall be effective on the date specified in the regulations.

"CERTIFICATION BY MOTOR VEHICLE MANUFACTURERS

"SEC. 7. (a) Any manufacturer of motor vehicles may certify for labeling or advertising purposes that new motor vehicles of such manufacturer meet United States traffic safety performance standards for new motor vehicles if such manufacturer submits proof adequate in the judgment of the Secretary that the new motor vehicles of such manufacturer comply with the relevant national traffic safety performance standards prescribed pursuant to this Act.

"(b) The Secretary shall by regulation prescribe the time and manner of submitting proof required for certification under this section.

"(c) The Secretary may prescribe an appropriate mark or symbol for use by such manufacturers who comply with the national traffic safety standards prescribed pursuant to this Act.

"GRANTS TO THE STATES FOR A UNIFORM TRAFFIC SAFETY PROGRAM

"SEC. 8. (a) The Secretary is authorized in accordance with the provisions of this section to make grants to the States to pay up to 30 per centum of the cost of the establishment or expansion of State programs for improving highway traffic safety.

* * *

"REGISTER OF REVOKED LICENSES

"SEC. 9. (a) The Secretary shall establish and maintain a register containing the name of each individual reported to him by a State, or political subdivision thereof as an individual with respect to whom such State or political subdivision has terminated or temporarily withdrawn an individual's license or privilege to operate a motor while because of (1) driving while under the influence of intoxicating liquor, or (2) conviction of a violation of a statute of a State, or ordinance of any political

subdivision thereof which resulted in the death of any person. Such register shall contain such other information as the Secretary may deem appropriate to carry out the purposes of this section.

"(b) The Secretary shall, at the request of any State, or political subdivision thereof, furnish such information as may be contained in the register established under this section with respect to any individual applicant for a motor vehicle operator's license or permit in such State or political subdivision.

"TRANSFER OF MOTOR VEHICLE SAFETY FUNCTIONS FROM THE GENERAL SERVICES ADMINISTRATION

SEC. 10. (a) The functions of the Administrator of General Services under the Act entitled 'An Act to require passenger-carrying motor vehicles purchased for use by the Federal Government to meet certain passenger safety standards', approved August 30, 1964, are transferred to the Secretary of Commerce.

"(b) All personnel, property, records, obligations, commitments, and unexpended balances of appropriations, allocations, and other funds, which the Director of the Bureau of the Budget determines are used primarily with respect to any function transferred under the provisions of this section, are transferred to the Department of Commerce.

"(c) All laws relating to any agency or function transferred under this section shall, insofar as such laws are applicable, remain in full force and effect. Any transfer of personnel pursuant to this section shall be without change in classification or compensation, except that this requirement shall not operate to prevent the adjustment of classification or compensation to conform to the duties to which such transferred personnel may be assigned. All orders, rules, regulations, permits, or other privileges made, issued or granted by any office or agency in connection with a function transferred by this section, and in effect at the time of the transfer, shall continue in effect to the extent as if such transfer had not occurred, until modified,

superseded, or repealed. No suit, action, or other proceeding lawfully commenced by or against any agency or officer of the United States acting in his official capacity shall by reason of any transfer made pursuant to this section except that the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect showing a necessity for a survival of such suit, action or other proceeding to obtain a settlement of the question involved, may allow the same to be maintained by or as the appropriate agency or officer of the United States.

"(d) The provisions of this section shall be effective after ninety days following the date of its enactment.

REPORTS AND RECOMMENDATIONS

SEC. 11. (a) The Secretary shall prepare and submit to the President for transmittal to the Congress at least once in each fiscal year a comprehensive report on the administration of this Act.

(b) In the annual report to be submitted by June 30, 1967, the Secretary shall make such recommendations for additional legislation as he deems necessary to promote cooperation among the several States in the improvement of traffic safety and to strengthen the national traffic safety program.

* * *

H.R. 13228

IN THE HOUSE OF REPRESENTATIVES

MARCH 2, 1966

MR. STAGGERS introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To provide for a coordinated national safety program and establishment of safety standards for motor vehicles in interstate commerce to reduce traffic accidents and the deaths, injuries, and property damage which occur in such accidents.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Traffic Safety Act of 1966".

SEC. 2. The Congress hereby declares that the purpose of this Act is to reduce traffic accidents and the deaths, injuries, and property damage resulting from traffic accidents. To this end, the Secretary of Transportation shall have authority to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to encourage and provide financial assistance in developing State traffic safety programs under effective standards for drivers, motor vehicles, postaccident care and the traffic environment, including highways.

TITLE I—MOTOR VEHICLE SAFETY STANDARDS

DEFINITIONS

SEC. 101. As used in this title—

(a) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner

that the public is protected against unreasonable risk of accidents occurring as a result of the design of motor vehicles and is also protected against unreasonable risk of death or injury or property damage in the event accidents do occur.

(b) "Motor vehicle safety standard" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria on which the public may rely in assuring motor vehicle safety.

(c) "Motor vehicle" means any vehicle driven or drawn by mechanical or other power, primarily for use on the public roads, streets and highways, other than (1) a vehicle subject to safety regulations under part II of the Interstate Commerce Act, as amended (chapter 8, title 49 of the United States Code), or under the Transportation of Explosives Act as amended (sections 831-835 of chapter 39, title 18 of the United States Code), and (2) a vehicle or car operated exclusively on a rail or rails.

(d) "Motor vehicle equipment" means any system, part or component of a motor vehicle as originally manufactured or any similar part or component manufactured or sold for replacement or improvement of such system, part or component or as an accessory or addition to the motor vehicle.

(e) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(f) "Interstate commerce" means commerce between any place in a State and any place in another State, or between places in the same State through another State.

(g) "Secretary" means Secretary of Transportation.

FEDERAL MOTOR VEHICLE SAFETY STANDARDS

SEC. 102. (a) The Secretary shall, from time to time, review existing public and private motor vehicle safety standards and the degree of effective compliance existing with respect to such standards. If, at any time after two years from

the date of the enactment of this Act he determines that there is a need for a new or revised motor vehicle safety standard and that—

(1) no motor vehicle safety standard exists;

(2) any existing motor vehicle safety standard is inadequate to protect the public against unreasonable risk of accidents or of death, injury, or property damage resulting therefrom, as defined in section 101 (a):

(3) any existing motor vehicle safety standard is not based upon all measurements of performance necessary to the achievement of motor vehicle safety; or

(4) the degree of effective compliance with respect to any existing motor vehicle safety standard is insufficient to achieve adequate motor vehicle safety; then the Secretary is authorized to establish and issue by order in accordance with section 4 of the Administrative Procedure Act, appropriate Federal motor vehicle safety standards for motor vehicles or motor vehicle equipment.

(b) A Federal motor vehicle safety standard issued by order pursuant to subsection (a) shall become effective on the date specified by the Secretary in that order, which shall be no sooner than one hundred and eighty days nor later than two years from the date on which the standard is issued. No State or local government law, regulation, or ordinance to establish a safety standard for a motor vehicle or item of motor vehicle equipment in interstate commerce if a Federal motor vehicle safety standard issued in conformance with the provisions of this title is in effect with respect to that motor vehicle or item of motor vehicle equipment; and any such law, regulation, or ordinance purporting to establish such safety standards and providing a penalty or punishment for an act of noncompliance therewith shall be null, void, and of no effect. However, nothing herein shall be construed to prevent a State or local government or the Federal Government from establishing requirements more stringent than a Federal motor vehicle safety standard for the exclusive purpose of its own procurement.

(c) The Secretary, from time to time, and subject to section 4 of the Administrative Procedure Act, may by order amend or withdraw Federal motor vehicle safety standards issued under this section. Amendments or withdrawals shall be effective on the date specified by the Secretary in that order, which shall be no sooner than one hundred and eighty days nor later than one year from the date on which the amendment or withdrawal is issued, unless the Secretary finds, publishing his reasons therefor, that an earlier or later date is in the public interest.

JUDICIAL REVIEW OF ORDERS

SEC. 103. (a)(1) In a case of actual controversy as to the validity of any order under section 102, any person who will be adversely affected by such order when it is effective may at any time prior to the forty-fifth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall place in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of Title 28 of the United States Code.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or to new findings, by reason of the additional evidence and he shall file such modified or new findings, and recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(b) A certified copy of the transcript of the record and proceedings under this section shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, libel for condemnation, exclusion of imports, or other proceeding arising under or in respect to this title, irrespective of whether proceedings with respect to the order have previously been instituted or become final under subsection (a).

RESEARCH, TESTING, AND DEVELOPMENT

SEC. 104. The Secretary, in cooperation with other departments and agencies as provided in section 113, is authorized to undertake appropriate research, testing, and development for motor vehicle safety and motor vehicle safety standards to accomplish the purposes of this title and, in exercising this authority, may perform the following functions:

(a) gathering or collecting existing data from any source for the purpose of determining the relationship between motor vehicle or motor vehicle equipment per-

formance characteristics and (1) accidents involving motor vehicles, and (2) the occurrence of death, personal injury or property damage resulting from such accidents;

(b) contracting for the fabrication of or directly purchasing, notwithstanding any other provision of law, motor vehicles or motor vehicle equipment for research and testing purposes, and the testing of motor vehicles and motor vehicle equipment to accomplish the purposes of this title, even though such tests may damage or destroy the vehicles or equipment being tested;

(c) selling or otherwise disposing of motor vehicles or motor vehicle equipment tested pursuant to subsection (b), notwithstanding any other provision of law and reimbursing the proceeds of such sale or disposal into the appropriation or fund current and available for the purpose of carrying out this title: *Provided,* That motor vehicles and motor vehicle equipment which have been rendered irreparably unsafe for use on the highways, by testing pursuant to subsection (b), shall be sold or disposed of in a manner insuring that they shall not be used on the highways or on vehicles for use on the highways;

(d) performing or having perfomed all research, development and information gathering and disseminating activities necessary and appropriate for motor vehicle safety and motor vehicle safety standards, and purchasing or acquiring equipment and facilities related thereto, or fabricating needed motor vehicle equipment to accomplish the purposes of this title, including—

(1) relating motor vehicle and motor vehicle equipment performance characteristics to motor vehicle safety;

(2) determining the effects of wear and use of motor vehicles and motor vehicle equipment upon motor vehicle safety;

(3) evaluating and developing methods and equipment for testing, inspecting and determining safety of motor vehicles and motor vehicle equipment;

(4) evaluating and developing methods and equipment for determining adequacy of motor vehicle safety standards, and compliance of motor vehicles with motor vehicle safety standards; and

(5) developing appropriate motor vehicle safety standards.

(e) awarding grants to State or interstate agencies and nonprofit institutions for performance of activities authorized in this section.

COOPERATION

SEC. 105. In addition to such advisory authority as the Secretary otherwise may exercise, he is authorized to advise, assist, cooperate with, or enter into cooperative agreements with and receive and expend funds made available thereunder by Federal agencies, State or other public agencies, businesses, universities or other institutions in the planning or development of:

(a) motor vehicle safety standards;

(b) method for inspecting or testing under motor vehicle safety standards;

(c) motor vehicle and motor vehicle equipment methods and test equipment.

TRAINING

SEC. 106. (a) The Secretary is authorized to train, or establish training programs for, personnel of Federal agencies, State or other public agencies or institutions, private firms and private institutions by grants to or contracts with such agencies, firms or institutions for the purpose of achieving motor vehicle safety as provided in this title. He may receive and expend funds made available under a cooperative agreement or utilize motor vehicles or motor vehicle equipment furnished thereunder for training purposes.

* * *

PROHIBITED ACTS

SEC. 107. (a) No person shall—

(1) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect under this title unless it is in conformity with such standard as prescribed or amended by the Secretary pursuant to section 102 except as provided in subsection (b) of this section: or

(2) fail or refuse access to or copying of records or fail to make reports or provide information, as required under section 111(b).

(b)(1) Paragraph (1) of subsection (a) shall not apply to the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any motor vehicle or motor vehicle equipment after the first purchase of it in good faith for purposes other than resale.

(2) A motor vehicle or item of motor vehicle equipment offered for importation in violation of paragraph (1) or subsection (a) shall be refused admission into the United States under joint regulations issued by the Secretary of the Treasury and the Secretary; except that the Secretary of the Treasury and the Secretary may, by such regulations provide for authorizing the importation of such motor vehicle or item of motor vehicle equipment into the United States upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or item of motor vehicle equipment will be brought into conformity with any applicable Federal motor vehicle safety standard prescribed under this title, or will be exported or abandoned to the United States.

(3) The Secretary of the Treasury and the Secretary may, by joint regulations, permit the temporary importation of any motor vehicle or item of motor vehicle equipment, after the first purchase of it in good faith for purposes other than resale, notwithstanding paragraph (2) of this subsection.

(4) Paragraph (1) of subsection (a) shall not apply in the case of a motor vehicle or item of motor vehicle equipment intended solely for export, and so labeled or tagged on the vehicle or item itself and on the outside of the container, if any.

CIVIL PENALTY

SEC. 108. (a) Whoever violates any provision of section 107, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Such violation of a provision of section 107, or regulations issued thereunder, shall constitute a separate violation with respect to each motor vehicle or item of motor vehicle equipment or with respect to each failure or refusal to allow or perform an act required thereby.

(b) Any such civil penalty may be compromised by the Secretary. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

JURISDICTION; INJUNCTION

SEC. 109. (a) The United States district courts and the United States courts of the Commonwealth of Puerto Rico and the territories and possessions shall have jurisdiction, for cause shown and subject to the provisions of rule 65(a) and (b) of the Federal Rules of Civil Procedure, to restrain violations of this title upon petition by the appropriate United States Attorney or the Attorney General on behalf of the United States.

(b) In any proceeding for criminal contempt for violation of an order, injunction or restraining order issued under this section, which violation also constitutes a violation of this title, trial shall be by the court or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the manner of proceedings subject to the provisions of rule 42(b) of the Federal Rules of Criminal Procedure.

(c) In all libel or injunction proceedings for the enforcement or to restrain violations of this title, subpenas for witnesses who are required to attend a court of the United States in any district may run into any other district in any such proceeding.

SEIZURE

SEC. 110. (a) Any motor vehicle or motor vehicle equipment that has been manufactured or introduced into commerce in violation of section 107 shall be liable to be proceeded against by the United States while in interstate commerce, or while held for any sale after shipment in interstate commerce until the occurrence of the first purchase of it in good faith for purposes other than resale, or libel of information and condemned in any district court of the United States and in any United States court for the Commonwealth of Puerto Rico or the territories and possessions.

(b) Such motor vehicle or item of motor vehicle equipment shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libels for condemnation proceedings under this section, involving the same claimant, are pending in two or more jurisdictions, such pending proceedings, upon application of the United States or the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the applicant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the United States or the claimant may apply to the court of any such jurisdiction, and such court (after giving the other party, the claimant, or the United States attorney for such district, reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such

pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any order the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the case covered thereby.

(c) Any motor vehicle or item of motor vehicle equipment condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the evidence may, in accordance with the provisions of this section, dictate and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such motor vehicle or item of motor vehicle equipment shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: *Provided,* That, after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such motor vehicle or item of motor vehicle equipment shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or territory in which sold, the court may by order direct that such motor vehicle or item of motor vehicle equipment be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the person obtaining release of the motor vehicle or item of motor vehicle equipment under bond.

(d) When a decree of condemnation is entered against the motor vehicle or item of motor vehicle equipment, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the motor vehicle or item of motor vehicle equipment.

(e) In the case of removal for trial of any case provided by subsection (b) of this section—

(1) the clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction;

(2) the court to which such case is removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed.

INSPECTION AND TESTING FOR COMPLIANCE; RECORDS AND REPORTS

SEC. 111. (a) The Secretary is authorized to conduct such testing and inspection as he deems necessary to aid in the enforcement of Federal vehicle safety standards issued and in effect under this title and shall furnish the Attorney General and, when appropriated, the Secretary of the Treasury any information obtained and test results indicating noncompliance with such standards, for appropriate enforcement or customs action.

(b) Every manufacturer of motor vehicles and motor vehicle equipment shall establish and maintain such records, make such reports, and provide such information as the Secretary may reasonably require to enable him to determine whether such manufacturer has acted or is acting in compliance with this title and motor vehicle safety standards prescribed pursuant to this title and shall, upon request of an officer or employee duly designated by the Secretary, permit such officer or employee to inspect appropriate books, papers, records, and documents.

(c) All information reported to or otherwise obtained by the Secretary or his representative pursuant to subsection (b) which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act.

BRAKE FLUID AND SEAT BELT STANDARDS

SEC. 112. (a) Public Law 87-637 (Act of September 5, 1962, 76 Stat. 437, 15 U.S.C. 1301-1303), and Public Law 88-201 (Act of December 13, 1963, 77 Stat. 361, 15 U.S.C. 1321-1323) are hereby repealed. Any rights or liabilities now existing under Public Laws 87-637 and 88-201 shall not be affected by this repeal.

(b) Standards issued under the laws repealed in this section shall continue in full effect and may be amended as if they had been effectively issued pursuant to section 102. Such standards shall, after enactment of this Act, be subject to the enforcement and all other provisions of this title.

AVOIDANCE OF DUPLICATION

SEC. 113. The Secretary, in exercising the authority under this Act, shall utilize the services, research and existing facilities of other departments and agencies to the maximum extent practicable in order to avoid duplication of facilities and services operated by the department agencies.

REGULATIONS

SEC. 114. The Secretary is authorized to issue, amend and withdraw such rules and regulations as he may deem necessary or appropriate to carrying out the provisions of this Act.

* * *

TITLE II—TRAFFIC ACCIDENT AND INJURY RESEARCH AND TEST FACILITY

SEC. 201. The Secretary of Transportation is hereby authorized, acting independently or in cooperation with other Federal departments or agencies, to plan, design, construct, maintain, and operate a facility or facilities, within the District of Columbia or elsewhere, in which to conduct so much of the research, development, and testing provided for by this Act, and other research, development, and testing in traffic safety authorized by law, as he may deem appropriate and necessary.

"§403. Highway safety research and development

"For the purpose of strengthening the highway safety program of the Federal Government, the Secretary is authorized to expand the highway safety research and development activities under section 307(a) of title 23, United States Code, to cover all aspects of highway safety which shall include, but not be limited to, highway safety systems research and development relating to vehicle, highway, or driver characteristics, accident investigations, communications, emergency medical care, and transportation of the injured. The Secretary may use the funds appropriated for any fiscal year for the purposes of this section, independently or in cooperation with other Federal departments or agencies, for grants to State or local agencies, institutions, individuals for training or education of highway safety personnel, research fellowships in highway safety, development of improved accident investigation procedures, community emergency medical service plans, demonstration projects or for related activities which are deemed by the Secretary to be necessary to carry out the purposes of this section.

"§404. National Driver Register service

"(a) The Secretary shall establish and maintain a register containing the name of each individual reported to him by a State, or political subdivision thereof, as an individual with respect to whom such State or political subdivision has denied, terminated, or temporarily withdrawn (except a withdrawal for less than six months based on habitual violation) an individual's license or privilege to operate a motor vehicle. Such register shall also contain such other information as the Secretary may deem appropriate to carry out the purposes of this section.

"(b) The Secretary shall, at the request of any State, or political subdivision thereof, or at the request of any Federal department or agency, furnish such information as may be contained in the register established under subsection (a) with respect to any individual applicant for a motor vehicle operator's license or permit.

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Nos. 82-354, 82-355, 82-398

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 19[illegible]

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Superintendent of Insurance
Two World Trade Center
New York, New York 10047
(212) 488-2464

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

ROBERT S. HAMMER
Assistant Attorney General

MARTIN MINKOWITZ
Deputy Superintendent and
General Counsel

MILTON L. FREEDMAN
Assistant Deputy Superintendent
and Counsel

New York State Insurance Department
Of Counsel

Question Presented

Whether the revocation by the National Highway Traffic Safety Administration (NHTSA) of the "passive restraint" requirements of Federal Motor Vehicle Safety Standard 208 was arbitrary, capricious and unlawful?

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK

Opinions Below

The June 1, 1982 opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-76a)* is reported at 680 F.2d 206. The August 4, 1982 supplemental order and memorandum of the Court of Appeals (Pet. App. 79a-82a) are not reported.

Jurisdiction

The jurisdiction of the Court of Appeals was invoked pursuant to 15 U.S.C. § 1394(a)(1). The judgment of the Court of Appeals (Pet. App. 160a-161a) was entered on June 1, 1982, and the supplemental order of the Court of Appeals (Pet. App. 79a-80a) was entered on August 4, 1982. The petitions for a writ of certiorari in Nos. 82-354 and 82-355 were filed on August 30, 1982. On August 24, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 82-398 to and including September 8, 1982, and the petition was filed on that date. The petitions for a writ of certiorari were granted on November 8, 1982. The jurisdictions of this Court rests upon 28 U.S.C. § 1254(1) and 15 U.S.C. § 1394(a)(4).

Statutes Involved

Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392, and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, are reproduced in pertinent part in the Appendix to the Government's brief at 1a-2a.

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* Numbers in parentheses preceded by "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 82-354.

Statement of the Case

In the interests of brevity, the Court is respectfully referred to the statement of the case contained in the briefs submitted by the other respondents and in the opinion of the Court of Appeals (Pet. App. 4a-24a).

Summary of Argument

The record of these proceedings demonstrates that NHTSA's rescission of Federal Motor Vehicle Safety Standard (FMVSS) 208 was arbitrary, capricious and unlawful. The Court of Appeals (Pet. App. 46a *et seq.*) gave due deference to the agency's views and properly employed the "rational basis" test relied upon by all parties.

The elimination of passive restraints violated the requirement of the 1966 National Traffic and Motor Vehicle Safety Act that NHTSA adopt practicable standards to promote motor vehicle safety. Passive restraints work. They can be installed in new automobiles at moderate cost, and will result in direct savings to the consumer in the form of reduced automobile insurance premiums. Premium discounts for vehicles equipped with passive restraints have already been adopted by insurers writing two-thirds of the automobile casualty business in New York. They will be mandated for the rest of the industry when passive restraints are implemented. The reduction in the number of deaths and the frequency and severity of personal injuries resulting from front-end collisions will, in addition, necessarily lessen the burden upon private life, accident and dis-

ability insurance, workers' compensation systems, Federal survivors (42 U.S.C. § 402) and disability insurance (*id.* § 423); Supplemental Security Income (*id.* § 1381), Aid to Families With Dependent Children (*id.* § 601) and other State public assistance programs such as New York's Home Relief, N.Y. Social Services Law § 157. Public and private employers would benefit from less employee time lost due to accidents and the need to hire substitutes. One cannot assign a dollar amount to the fewer widows and orphans, crippled and maimed that would result from the mandated use of passive restraints.

Regrettably, the Government has approached the requirement for passive restraints in an entirely irresponsible fashion. NHTSA first allowed the automobile industry to "comply" with Standard 208 by approving what it subsequently concluded was an easily defeasible seatbelt that was not a passive restraint at all. NHTSA could have moved to modify its standard if it determined it was defective. Rather, it invoked its own failure to enforce Standard 208 as an excuse to dispense with it entirely. When called to account by the Court of Appeals, its response was to propose yet additional, open-ended "study" of a matter which had been "studied" for well over a decade. NHTSA's approach to automobile passenger safety is to engage in a demonstrably ineffective program of "educating" the public to voluntarily use the presently mandated seatbelt system. Meanwhile, the needless slaughter on the highways goes on.

ARGUMENT

POINT I

The Judgment of the Court of Appeals Was in Full Accord with the Administrative Procedure Act.

In determining that NHTSA's rescission of FMVSS 208 was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), the Court of Appeals followed the standard analysis applicable to informal rule making under the Administrative Procedure Act (Pet. App. 24a, *et seq.*) which the respondents, themselves, concede to be the appropriate standard of review. *See, e.g.*, Gov't Br. p. 23, *et seq.*; Consumer Alert Br. p. 6; see also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971); *Industrial Union Dep't* v. *American Petroleum Institute*, 448 U.S. 607, 662-63 (1980) (Burger, C.J., concurring). Little, if anything, need be added to its opinion in this regard.

POINT II

Retention of the Passive Restraint Standard Will Clearly Protect Automobile Passengers from Death and Serious Injury and Result in Substantial Economic Savings.

In enacting the National Traffic and Motor Vehicle Safety Act of 1966, it was the express purpose of Congress to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381. To that end, Congress mandated that NHTSA adopt safety

standards that are "practicable [and] meet the need for motor vehicle safety". This is defined as—

> "the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.
>
> " 'Motor vehicle safety standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391 (1)(2).

See also: 15 U.S.C. § 1392(a). By deleting from Standard 208 the requirement of automatic or passive restraints for the front seats of passenger cars—a measure that would offer substantial protection from bodily injury and the resulting economic loss—NHTSA failed to meet these statutory requirements. The clear effect of passive restraints in fulfilling the cost-effectiveness and practicability requirements of the statute can be seen in the area of automobile insurance. The pervasive role of the automobile as a major means of transportation has made automobile insurance coverage an essential form of protection. As regulator of the insurance industry in the State of New York,* the Superintendent of Insurance is the guardian of the State's

* The Superintendent of Insurance of the State of New York is charged with the rights, powers and duties express or implied by the Insurance Law in connection with the supervision of the business of insurance in New York, N.Y. Insurance Law § 10, *Ostrer* v. *Schenck*, 41 N.Y.2d 782, 785, 364 N.E.2d 1107, 1108, 1109, 396 N.Y.S.2d 335, 336-337 (1975). Other state insurance regulators have similar powers.

compelling interest in assuring the availability, at reasonable cost, of insurance protection against economic losses due to automobile accidents.

States such as New York have, in recent years, sought to reduce the cost of automobile insurance by such means as eliminating unnecessary litigation, through "no-fault" laws; making the payment of claims more efficient, and controlling the cost of medical care, N.Y. Insurance Law § 670, *et seq.*; § 678; *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 49-52, 340 N.E.2d 444, 448-450, 378 N.Y.S. 2d 1, 7-10 (1975). The cost of insurance must, however, reflect anticipated claims. No matter how efficient the system is, only a reduction in the frequency and severity of automobile injuries holds a promise of large-scale premium reductions. (See generally, affidavit of Superintendent of Insurance Albert B. Lewis, sworn to December 22, 1981 in support of motion to intervene in Court of Appeals.)

These objectives, as well as those of Congress in legislating the Safety Act, are advanced by the requirement for passive restraints. During the course of the administrative proceedings, Dr. William Nordhaus, Professor of Economics, Yale University and a former member of the President's Council of Economic Advisors, testified without contradiction that the failure to employ passive restraints would result in an annual increase of 6,400 fatalities and at least 120,000 moderate to critical injuries, resulting from front-end collisions (Pet. App. 122a). These facts are not new; they have been conclusively established over the more than two decades in which automobile passenger safety research has been conducted and are conceded by NHTSA in its own analyses (Pet. App. 14a-15a, 94a). On the other

hand, the mandatory introduction of passive restraints would necessarily be translated into fewer and less expensive bodily injury claims and the savings would be passed on to the consumer.

As the Court of Appeals observed (Pet. App. 65a, n. 37), it is the Superintendent's intent to require all automobile insurers to introduce discounts on the personal injury portion of automobile insurance premiums applicable to cars equipped with proper passive restraint systems. They would be based upon reasonable projections of the expected reductions in the frequency and severity of injuries to passengers in motor vehicles so equipped. Anticipated performance would be reflected in lower automobile insurance premiums charged for such vehicles. Thus, whatever the consumer spends on airbags or other passive restraints may well be offset by premium savings alone.

It has been estimated that airbags, the most effective passive restraint, could be installed at a cost to the consumer of $200-$300, assuming the economics of mass production (Pet. App. 16a).* Since the average bodily injury portion of a New York no-fault premium is $75.00 per year, the 25-30% anticipated discount would translate into a total saving of $300 over a ten-year life of the average vehicle.

Bodily injury liability insurance premiums are closely related to the severity and cost of "no-fault" claims, since,

* The $800-$900 estimate for the 4,000 cars in which Mercedes-Benz plans to install airbags, N.Y. Times, Jan. 29, 1983, p. 12, col. 1, is clearly excessive for mass production and universal installation. A stark contrast to the mere ten per cent installation in a luxury car that its manufacturer would regard as proof of successful marketing of airbags as an optional extra. N.Y. Times, Feb. 3, 1983, p. D2, col. 1.

by definition, New York limits tort actions to "serious injuries", as defined in N.Y. Insurance Law §671(4). Bodily injury settlements and judgments tend to be multiples of special damages, *i.e.*, medical costs and lost wages which are payable under no-fault.

Since the severity and frequency of serious injuries will be reduced by passive restraints, a reduction of the bodily injury premium will necessarily follow. At present, the average bodily injury liability rate is $150, per year. Assuming an anticipated saving of only fifteen percent, per year over the same ten-year period—a most conservative estimate—the savings on this coverage would be another $300. Thus, the automobile insurance premium savings would more than offset the cost of universally installed airbags.*

It is also most significant that companies insuring more than two-thirds of the automobile risks in the State of New York have *already* filed rating plans which offer from twenty-five to thirty percent discounts on the Personal Injury Protection (no-fault) portion of automobile insurance premiums. This is a clear recognition by the insurance industry's actuaries of the expected reduction in the frequency and severity of death and injury to passengers in automobiles equipped with passive restraints. Upon the implementation of Standard 208, all insurers will be required to file rates which provide for appropriate passive restraint discounts. Such action would be based upon the Superintendent's statutory authority, N.Y. Insurance Law

* The foregoing analysis was compiled by the New York State Insurance Department on the basis of rate filings, which are public documents, and assumes a most convervative increase in premium rates of 8% annually.

Art. VII-A (Sections 175-179-a inclusive—"Rate Regulation and Promotion of Competition") and Article VIII (Sections 180-189 inclusive—"Rates and Rating Organizations") of the New York Insurance Law which provide that rates shall not be "excessive, inadequate or unfairly discriminatory" (N.Y. Ins. Law §§ 175 and 180). Other states employ comparable standards in their evaluation of filed rates.

In addition to the direct savings to the consumer in the form of lowered insurance premiums, the economy, as a whole, will derive significant benefits from the mandatory installation of passive restraints. One must bear in mind that the cost of automobile related death and injury is borne not only by private life, accident and disability insurers, but by workers' compensation systems, Federal Social Security survivors (42 U.S.C. § 402) and disability (*id.* § 423) insurance, as well.* The frequent need to replace a temporarily disabled worker places additional burdens on private and public employers alike. When private insurance, workers' compensation and payroll-tax funded Social Security programs are insufficient to support the injured parties, the burden falls directly upon the taxpayer in the form of claims for Supplemental Security Income (42 U.S.C. § 1381), Aid To Families With Dependent Children (*id.* § 601) and other state public assistance programs such as New York's Home Relief, N.Y. Social Services Law § 157.

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* According to one study, the cost of medical care for victims of automobile accidents is second only to the cost of treating cancer and more costly than treating heart disease. See generally, Hartunian *et al.*, "The Incidence and Economic Costs of Cancer, Motor Vehicle Injuries, Coronary Heart Disease, and Stroke: A Comparative Analysis, 70 Am. J. Public Health 1249 (1980).

In the final analysis, however, one can never put a price tag on the broken bodies, broken families and shattered dreams that result from the needless death and injury that could be so easily avoided by the mandatory installation of passive restraints.

POINT III

NHTSA's Rescission of the Passive Restraint Portion of Standard 208 Was Arbitrary, Capricious and Unlawful.

A.

Although the National Traffic and Motor Vehicle Safety Act views with disfavor any practice which renders a safety device inoperative, 15 U.S.C. § 1397(a)(2)(A), NHTSA determined that a detachable seatbelt meets the requirement of Standard 208 and that, accordingly, automobile manufacturers may choose such a system instead of a non-detachable seatbelt or airbags.* But NHTSA reasoned, since the public can, and most people will, disengage detachable safety devices, Standard 208 would not achieve its purpose insofar as it related to passive restaints (Pet. App. 96a-105a). NHTSA's reasoning is contrary to clear Congressional mandate that effective mechanisms be included in motor vehicles to reduce the severity of injuries.** If NHTSA was unconvinced as to the performance of de-

* Compare the Volkswagen and Chevette, which feature automatic seatbelts with ignition interlock (Pet. App. 51a-54a).

** On the contrary, adoption of NHTSA's position at a time when smaller, lighter motor vehicles are replacing larger, more protective vehicles, could result in an increase in the severity of injuries and loss of life (Pet. App. 14a).

tachable belts, its duty was to require industry to offer a system which truly functioned as a passive restraint. As the Court of Appeals noted (Pet. App. 72a), the evidence, indeed, justified requiring the installation of airbags as the sole form of passive restraint.*

B.

Much has been said by NHTSA and the automobile manufacturers as well as some of their supporters that government ought not to require manufacturers to install passive restraints in automobiles, but should, instead, educate the public to the value of voluntarily utilizing the lap-shoulder belts presently in use. *See, e.g.*, Pet. App. 110a-112a, 126a). They advocate an educational campaign to use present seatbelt systems as a substitute for passive restraints with the full knowledge that such efforts have been an abysmal failure wherever tried, *Status Report*, Vol. 16, No. 9, p. 1 (Insurance Institute For Highway Safety, June 24, 1981). Indeed, Congressional skepticism as to the efficacy of spending money for educational campaigns which have proven to have no lasting effect was highlighted by its refusal to allow funds for such use, unless the Government required its own employees to use seatbelts and set specific goals against which the Congress could measure their worth, *Status Report*, Vol. 18, No. 1, p. 2 (Insurance Institute For Highway Safety, January 18, 1983).

* Except for forbidding the automatic ignition interlock, Congress has given free rein to NHTSA to develop effective safety standards. While it has shown a reluctance to affirmatively require specific methods to achieve results, its refusal to interfere with the passive restraint concept reflects an ongoing awareness and tacit approval of it.

The demonstrated futility of attempting to educate the public to voluntarily use lap and shoulder belts is but one more argument in favor of mandatory passive restraints.*

Thus, as Circuit Judge Mikva found (Pet. App. 74a), the administrative record demonstrates that NHTSA's rescission of Standard 208 was completely unjustified. As the Court of Appeals later noted, the agency showed no intention of setting its house in order by addressing the points discussed in that Court's opinion (Pet. App. 82a, 85a), but instead attempted to thwart its mandate by proposing yet an additional period of open-ended "study" (Pet. App. 130a, 139a, *et seq.*).

C.

It is, we suggest, significant that the National Association of Insurance Commissioners (NAIC), representing the insurance regulators of every state, commonwealth and territory, has, by unanimous resolution, determined to participate in this appeal as *amicus curiae* to urge affirmance of the judgment below. The NAIC acted with rare unanimity, demonstrating that not only the insurance industry as a whole but the insurance regulators view NHTSA's action here to be irresponsible and contrary to the public interest. Neither we nor the other regulators believe that the Court of Appeals' action involved any usurpation of the power of

* The automobile industry, by advocating the educational approach, would create the false impression that the currently available restraint systems were installed by its voluntary action. In fact, they were mandated by government directive after experience demonstrated that few members of the public would order them as optional equipment and industry refused to provide them as standard equipment (Pet. App. 6a, n). Now history is repeating itself with another campaign for voluntary self-protection.

the Executive. Indeed, it is the Executive Branch that has abdicated its responsibility to implement the will of Congress. It was nothing less than the Court of Appeals' obligation to require NHTSA to adhere to the statutory mandate.

The Government's request for a remand for further proceedings should be denied and the Court of Appeals' order that passive restraints remain part of Standard 208 affirmed. No useful purpose can be served by remanding to the agency for further administrative proceedings. It would only result in the continuation of the present attempt by NHTSA to undo over two decades of research and development and regulatory history and to repeal by administrative fiat the Congressional mandate to establish practicable standards for motor vehicle safety. Only a peremptory mandate to NHTSA to implement Standard 208 with 1984 models, if physically possible, will carry out the will of Congress and conform to the clearly established efficacy of installing the passive restraint systems. Any arguments by the automobile industry that it will not be able to comply should be rejected out of hand, since the industry has been on notice of its responsibility for nearly a decade (Pet. App. 6a).

Conclusion

The judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Dated: New York, New York
February 7, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Superintendent of Insurance

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

ROBERT S. HAMMER
Assistant Attorney General

MARTIN MINKOWITZ
Deputy Superintendent and
General Counsel

MILTON L. FREEDMAN
Assistant Deputy Superintendent
and Counsel

New York State Insurance Department
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1982

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Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, CHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.

April 19, 1983

[Counsel listed on inside cover]

Of Counsel:

WILLIAM H. CRABTREE
Vice President and
General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers
Association of the
United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and
General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Senior Staff Counsel
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

MILTON D. ANDREWS
DONALD M. SCHWENTKER
LANCE E. TUNICK
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007

Counsel for Petitioner Automobile Importers of America, Inc.

* *Counsel of Record*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-354, 82-355, 82-398

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN MOTORS CORPORATION, CHECKER MOTORS CORPORATION, CHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, VOLKSWAGEN OF AMERICA, INC., AND AUTOMOBILE IMPORTERS OF AMERICA, INC.*

Respondents avoid asking this Court to endorse the unprecedented theory of administrative law proclaimed by the court of appeals. Instead of defending the decision below, they urge this Court itself to review and set aside findings of the National Highway Traffic Safety Admin-

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* A list of parent companies, subsidiaries, and affiliates of the foregoing petitioners is set forth in the Appendices to Petition for Writ of Certiorari in No. 82-354 ("App.") at App. 172a-176a.

istration ("NHTSA") that the court of appeals accepted. They also ask this Court to declare that NHTSA's decision not to mandate the installation of passive restraints was unlawful under the Safety Act, a determination that the court of appeals declined to make. Alternatively, respondents urge this Court to reject NHTSA's reasons for exercising its discretion not to amend Standard 208 to prohibit manufacturers from complying with the standard by installing "detachable" passive belts. None of these invitations should be accepted. Rather, this Court should reverse the judgment below and uphold the agency's decision.

I. THE JUDGMENT BELOW MUST BE REVERSED; AS RESPONDENTS ESSENTIALLY CONCEDE, IT IS UNSUPPORTABLE.

Respondent State Farm does not defend two critical holdings of the court of appeals: (1) the agency could not lawfully rescind the passive restraint requirement on its finding of substantial uncertainty that the rule would significantly increase restraint system usage rates,[1] and (2) the burden of proof was on the agency to prove that passive belts would not significantly increase usage rates, rather than with those asserting that they would.[2] *See*

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[1] The court of appeals held:

> "There may well be 'substantial uncertainty' about the seatbelt usage rates that can be predicted if detachable belts are widely used . . . . If, as NHTSA contends, the passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, then only a well justified refusal to seek more evidence could render rescission non-arbitrary . . . . The agency . . . rested its decision only on 'substantial uncertainty' about these rates. Its decision to rescind the standard was thus arbitrary because the decision was supported by no record evidence whatsoever." App. 51a-54a.

[2] In the court of appeals' view, "the question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not." App. 51a. *See also* App. 31a n.10.

State Farm Br. 12-13, 38.[3] Respondents, unlike the court below, also recognize that NHTSA's rescission order could not have been held "arbitrary and capricious" by reference to equivocal legislative debates and votes relating to the merits and demerits of passive restraints that occurred years after passage of the Safety Act, and that do not "carr[y] the weight of positive law" (App. 46a). *See* State Farm Br. 13, 37 n.18; NAII Br. 45. On these questions presented in the petitions for certiorari, respondents appear to have little if any disagreement with petitioners. *See* State Farm Br. 13.

Instead, respondents suggest that *this* Court should function as the "reviewing court" under the Safety Act.[4] They urge this Court to hold what the court of appeals declined to hold—that the agency's "finding of 'substantial uncertainty' regarding the usage rates of detachables was . . . arbitrary and capricious." State Farm Br. 38, 34-42; NAII Br. 18-27.[5] Indeed, NAII's argument that detachable belts will often be reattached (NAII Br. 25-27) was squarely rejected by the court of appeals,

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[3] The court of appeals now seems to agree. In *Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1216 (D.C. Cir. 1983), a panel including two of the three members of the panel below unanimously held that an order rescinding certain of the CAB's nonsmoking rules "is reviewable in the same manner as earlier regulations" imposing those rules. The court did not cite its earlier opinion in this case.

[4] State Farm Br. 39. *See also* NAII Br. 40: "Petitioners' arguments focus solely on the opinion of the court of appeals, not on the lawfulness of the agency action . . . ."

[5] Contrary to respondents' suggestions (State Farm Br. 41 n.42; NAII Br. 44), the court of appeals did not reject NHTSA's findings of substantial uncertainty about usage rates as inaccurate. Instead, the court conceded that "there may well be" such uncertainty, but held that those findings "miss the point." App. 51a, 52a. It was decisive to the court of appeals that NHTSA had not carried the burden placed upon it by the court of proving the negative—that NHTSA *had not demonstrated* that detachable belts could not lead to benefits "that exceed their relatively small costs." App. 51a-52a.

which upheld as "reasonable" NHTSA's finding that, once detached, a detachable belt " 'becomes identical to a manual belt.' " App. 50a (quoting App. 98a). NAII further argues that the judgment below can be justified as required by the terms of the Safety Act (NAII Br. 10-16, 40-44), even though the court of appeals recognized that the rescission was not "in excess of statutory . . . authority." *See* App. 31a (citing 5 U.S.C. § 706(2)(C)). *See also* App. 46a.

Contrary to State Farm's suggestion (State Farm Br. 13), this Court need not and should not accept respondents' invitations to hold NHTSA's decision unlawful on grounds that were not adopted or were specifically rejected by the court of appeals. As the Court has held, it is particularly inappropriate to accept such invitations where the issues raised by the respondents—whether usage rates for detachable passive belts can reliably be predicted from limited data concerning usage rates for more coercive passive belts—are committed by law to the discretion of the factfinder in the first instance. *See United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975).[6] Moreover, in the absence of a cross-petition for certiorari granted by the Court, the Court will not en-

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[6] *Cf. Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (whether state regulations violated federal law); *ICC v. Illinois Central R.R.*, 215 U.S. 452 (1910) (whether ICC order violated Interstate Commerce Act).

Respondents' continued challenges to the agency's findings of substantial uncertainty have a hollow ring, given the business judgments of insurers like State Farm that it would be inappropriate to provide premium discounts to motorists who purchased cars equipped with detachable passive belts. *See* MVMA Br. 19 n.30. As the federal parties demonstrate in their reply brief (U.S. Rep. Br. 13-18), NHTSA's findings of substantial uncertainty about the usage rates that might be achieved with detachable passive belts were clearly reasonable in light of the absence of any comprehensive data concerning such usage rates—other than for systems with ignition interlocks, which Congress has outlawed as a means of compliance.

tertain an argument by the respondents that was not adopted by the court below where that argument would "expand the relief which has been granted" below.[7] NAII's argument that NHTSA had no discretion under the Safety Act not to mandate passive restraints would plainly expand the relief granted by the court below, and should not be entertained. As we now show, the argument is wrong in any event.

II. THE COURT OF APPEALS' HOLDING CANNOT BE JUSTIFIED EITHER BY THE TERMS OF THE SAFETY ACT OR BY THE PRIOR REGULATORY HISTORY OF STANDARD 208.

NAII advances its own theory in support of the judgment below—that substantial uncertainty was an inadequate basis for rescission here, "given *this* statute and *this* record." NAII Br. 41 (emphasis in original). *See also* id. at 10-16, 40-44. This theory depends upon a view of the Safety Act that was not accepted by the court of appeals. The argument both misreads the Safety Act and ignores the regulatory history of the passive restraint provisions of Standard 208.

The Safety Act does not require that the agency promulgate a rule mandating the installation of passive restraints. Although the Act mandates the issuance of "minimum" standards,[8] it requires that those standards be addressed only to "unreasonable risk[s]," [9] and it leaves to NHTSA in the first instance the question of what

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[7] *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982); *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); *Mills v. Electric Auto-lite Co.*, 396 U.S. 375, 381 n.4 (1970); *Langnes v. Green*, 282 U.S. 531, 538-39 (1931). *See generally* Stern, *When To Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974); 9 Moore's Federal Practice ¶ 204.11[3].

[8] 15 U.S.C. §§ 1391(2), 1392(a).

[9] *Id.* § 1391(1).

particular standards are to be issued.[10] With the single exception of fuel system integrity,[11] the Act does not mandate any particular safety standard, or any particular type of standard, for passenger cars—even though it explicitly does so for schoolbuses. *See* 15 U.S.C. § 1392 (i).[12] Accordingly, NHTSA's earlier decision "to abandon active restraints in favor of passive restraints" was not a requirement of the Safety Act, but an "exercise of

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[10] NAII notes that the Safety Act's requirement of mandatory standards was a change from the original proposal that would merely have authorized the agency to issue standards. NAII Br. 12-13. As the committee reports explained, however, Congress simply determined that there was a "present necessity" to have safety standards, and it left to the discretion of the Secretary what those standards should be and what they should cover so long as the Secretary stayed within the bounds of the statutory requirements that standards be "minimum standard[s] for motor vehicle performance" and be "reasonable, practicable and appropriate." *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 15-16 (1966); S. Rep. No. 1301, 89th Cong., 2d Sess. 4-7 (1966).

These statutory criteria may well *require* NHTSA to engage in some comparative weighing of the costs and benefits of active and passive restraint requirements. *See H & H Tire Co. v. DOT*, 471 F.2d 350, 353-55 (7th Cir. 1972); *id.* at 356-57 (Stevens, J., concurring). In any event, contrary to NAII's suggestion (NAII Br. 15-16), they clearly *permit* the agency to do so, as the court of appeals recognized. App. 17a.

[11] *See* 15 U.S.C. § 1392 note.

[12] While certainly one of the concerns that led to the Safety Act involved the "second collision" between the occupant and the interior of the vehicle following a crash (*see* NAII Br. 12), Congress also left to the agency's discretion how best to deal with that concern. NHTSA has issued no less than ten different standards designed principally to address that problem—including the current active restraint requirements of Standard 208. *See* 49 C.F.R. §§ 571.201 (instrument panel, seatback, interior compartment door, sun visor, and armrest impact); 571.202 (head restraint protection); 571.203 (steering control system impact); 571.204 (steering control rearward displacement); 571.205 (windshield glazing); 571.207 (seating system stabilization); 571.208 (active seatbelts); 571.209 (seatbelt assemblies); 571.210 (seatbelt assembly anchorage); 571.213 (child restraint systems).

its administrative discretion," [13] and has historically been regarded by the agency as such. *See* MVMA Br. 34 n.63.

The Safety Act also specifically grants NHTSA discretion to "amend or revoke" any safety standard, such as Standard 208. 15 U.S.C. § 1392(e). As the court of appeals recognized (App. 24a-25a), the Act subjects such agency decisions to judicial review under the same provisions of the Administrative Procedure Act applicable to the issuance of safety standards in the first instance. 15 U.S.C. §§ 1392(b), 1394(a). Nothing in the Safety Act justifies the unusual burden-shifting and negative proof requirements imposed by the court of appeals in reviewing NHTSA's rescission action.[14]

NAII alternatively argues that the judgment of the court of appeals should be upheld because of "the agency's complete reversal of direction from a course it had followed for over a decade." NAII Br. 42-44, 45 & n.51.

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[13] *Chrysler Corp. v. DOT*, 472 F.2d 659, 674 (6th Cir. 1972). *See also Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1347 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

[14] Amicus American Insurance Association's statutory argument also fails. AIA suggests that this Court should "presum[e]" (AIA Br. 9) that NHTSA's action was based upon criteria other than those identified by the agency and reviewed by the court below, *i.e.*, upon "concern over the depressed economic state of the domestic automobile industry" (*id.* at 5), and that such a concern would have violated the Safety Act. Even if the agency had relied in part on the severe economic plight of the industry, this concern would not have violated the Safety Act, which as noted above requires the agency to consider whether its standards are "reasonable, practicable and appropriate." *See* note 10 *supra*. But as AIA recognizes (AIA Br. 6), the agency's findings do not rely on the industry's plight. This Court has consistently refused to invalidate agency actions based on motivations not reflected in the administrative record, and certainly does not presume the existence of such motivations. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *accord, Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *See also United States v. O'Brien*, 391 U.S. 367, 382-84 (1968) (purported motivations of Congress do not render statute unconstitutional).

See also State Farm Br. 11. While this part of NAII's argument (unlike its reliance upon the terms of the Safety Act) was incorporated in the decision below, the argument ignores the zig-zag regulatory history of the passive restraint requirement. As we have noted (MVMA Br. 5-9), the agency established a prospective passive restraint requirement in 1970, had that requirement indefinitely postponed by the Sixth Circuit's *Chrysler* decision in 1972, reproposed passive restraint requirements in 1974, revoked those proposals in favor of active restraints in 1975, extended those active restraint requirements indefinitely pending the Coleman demonstration program in 1977, and cancelled that program two months later.[15]

While NHTSA certainly had a duty in 1981 to explain clearly why it was rescinding the rule promulgated by Secretary Adams,[16] it fully discharged that duty. As it explained, the Adams decision had been based upon critical assumptions about significant increases in predicted usage rates with passive restraints that were no longer valid, and in light of the substantial uncertainty about those predicted usage rates the agency could no longer find that implementing the rule would meet the statutory criteria. The court of appeals imposed upon NHTSA the far different obligation that before it could

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[15] Contrary to NAII's suggestion (NAII Br. 45 n.51), NHTSA's order revoking its passive restraint requirement in 1975 did not indicate that the requirement would be reinstated. Instead, NHTSA extended the active restraint requirements through August 1976 and stated that those provisions "will in all likelihood be in effect for some period" thereafter. 40 Fed. Reg. 33977 (August 13, 1975). Secretary Coleman's later order eliminated *any* termination date so as to extend these active belt requirements "for the indefinite future." 42 Fed. Reg. 5071 (January 27, 1977).

[16] As the court of appeals held on review of the Adams rule, the Secretary must "provid[e] a sufficient explanation why his judgment differed from his predecessor's." *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1343-44, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

rescind a rule in these circumstances the agency had to develop evidence not presently in existence proving that predicted usage rates would not significantly increase. That unprecedented standard of judicial review cannot be permitted to stand.

III. NHTSA'S REJECTION OF AN AMENDMENT TO STANDARD 208 TO REQUIRE THE INSTALLATION OF NONDETACHABLE BELTS WAS NEITHER ARBITRARY NOR CAPRICIOUS.

State Farm's principal argument draws upon the holding of the majority below that it was arbitrary for NHTSA to rescind its prospective passive restraint requirement before evaluating other "obvious" versions of that requirement. App. 72a. The only such version State Farm seriously contends should have been "obvious" was amending Standard 208 to require manufacturers to install nondetachable belt systems.[17] But that was a version

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[17] Amicus American Insurance Association also argues that NHTSA should have "amend[ed] Safety Standard 208 to prescribe the use of air-bags only." AIA Br. 24. This argument goes far beyond what even the majority of the court of appeals held, *i.e.*, that NHTSA "should at least have considered and evaluated the benefits and costs of a standard relying only on airbags before it could rationally rescind Modified Standard 208." App. 64a.

Petitioners have already identified a number of the serious difficulties that would be posed by a mandatory airbag standard. MVMA Br. 39 n.71. These difficulties cannot be swept aside because they were not identified in the agency's decision. AIA Br. 13. The agency never proposed such a standard, and for this reason alone could not have adopted such a standard on this record. Moreover, such a standard would have been a radical departure from NHTSA's prior commitment to—and the Safety Act's requirement of—performance rather than design standards. Indeed, the agency rejected as long ago as 1969 a passive restraint approach relying solely on airbags. *See* MVMA Br. 6 & n.12. Even if the agency could properly have been compelled to consider an airbag-only standard on this record, it was an unlawful invasion of the agency's primary jurisdiction for the majority to mandate that the existing passive restraint requirement be restored while any such consideration was underway. *See Burlington Northern, Inc. v. United States*, 103 S. Ct.

NHTSA did evaluate and reject (App. 109a-110a), even though that alternative was not as "obvious" as State Farm claims. State Farm's argument ignores the agency's specific findings on this point. And its claim that mandating nondetachable belts was an "obvious" regulatory step relies in any event upon the erroneous view that nondetachable belts were "already in service." State Farm Br. 19.

1. The short answer to State Farm's argument is that NHTSA *did* consider and reject the "obvious" step of amending Standard 208 to require manufacturers to install nondetachable belt systems. The agency refused to impose such a requirement for two reasons: the safety need for quick emergency egress in crash situations, and the widespread public fear of being entrapped by fastened belts when an emergency occurs. State Farm's argument is really an effort to transfer the policy discretion conferred by the Safety Act from the agency to the courts, an effort plainly and properly foreclosed by this Court's prior decisions.[18]

Emergency Egress. State Farm denies that the agency has historically favored detachability to ensure emergency egress. It asserts that in 1971 NHTSA "contemplated that a spool release would be used and that detachable belts would be barred." State Farm Br. 33. This argument is disingenuous. As we have shown, this 1971 NHTSA notice of proposed rulemaking was never adopted. The idea of nondetachability met with almost unanimous opposition because of the need for ensuring emergency egress; accordingly, the agency rejected it in 1974 and mandated detachable belts. MVMA Br. 44 &

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514 (1982) (court of appeals may not, in remanding new rate order by ICC, prescribe that effect of remand is to reinstate prior rate).

[18] *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1972). *See also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 226-28 (1980) (error to overturn agency's consideration of alternatives under express requirement of NEPA simply because of court's own view that environmental factors should have been given "determinative weight").

n.84. It was certainly rational for NHTSA to have concluded that mandating nondetachable belts in all cars would have posed additional safety problems and therefore that such a requirement would not have met "the need for motor vehicle safety," 15 U.S.C. § 1392(a). *See* App. 110a.[19]

Fear of Entrapment. State Farm also disagrees with the record evidence that supports the agency's finding of a fear of entrapment that counselled against requiring nondetachable belts in all passenger cars. State Farm Br. 34 & n.34. But the survey State Farm relies upon found that "scared of being trapped" was the single most frequent explanation given for why most people do not wear seat belts—a factor that 48% of all survey respondents viewed as "very important." R. 1151-52.[20] Another "of the more recent and important studies" identified by NHTSA (R. 81-82) similarly concluded that "fear of entrapment . . . appears to be the most powerful

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[19] General Motors stated at the agency's 1981 hearing that the spool release system "is viable from a safety egress point of view." R. 1225-26. The agency's 1978 order permitting the development of spool release designs, however, recognized the possibility of "problems of emergency occupant egress," and announced the agency's intention to "monitor all new passive belt designs to assure that the release mechanisms are simple to understand and operate." 43 Fed. Reg. 52493, 52494 (November 13, 1978). As we note below, GM never installed a *nondetachable* spool release system in any of its cars.

[20] The 7% figure cited by State Farm represents only those who volunteered such fears in response to the open-ended question, "why is it that so many people do not wear their seatbelts?" R. 1150-51. The actual survey conclusion was that fear of entrapment is "a *latent* explanation for not wearing seat belts" that "is important, but it lurks beneath the surface"—because it is either a fear that is not immediately apparent, "a less socially acceptable reason," or an attitude that "is repressed and avoided." R. 1153 (emphasis in original). Whatever the reason, "it is clear that this 'myth of being trapped' is real, important, and must be dealt with." *Id.*

single attitude that related directly to non-use" of seatbelts. R. 1651. Contrary to State Farm's suggestion (State Farm Br. 34 n.34), fears of entrapment can hardly be presumed to be *greater* for detachable active belts than for nondetachable passive belt systems, which would have been far more coercive. On the basis of these concerns, and in accordance with the requirements of the Safety Act, the agency rationally concluded on the basis of such fears that mandating nondetachable belts would be "counterproductive" and "inappropriate." App. 110a.[21]

2. State Farm insists that the idea of amending Standard 208 to require nondetachable belts was "obvious" because nondetachable belts were "already in service" in VW Rabbits and GM Chevettes and had achieved significant increases in usage rates. State Farm Br. 19. State Farm suggests that NHTSA was obligated to consider such an amendment because of the plans of manufacturers to install "new" detachable belts that State Farm claims were "poorly designed." This purported distinction between "new" detachable belts and "proven"

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[21] Respondents assert that the fear of entrapment is relevant only insofar as it "can affect usage rates." State Farm Br. 35 n.36; NAII Br. 33. As the cited studies show, fear of entrapment clearly does have a significant effect upon usage rates. Moreover, public reaction is also a factor that NHTSA must—and did—consider quite apart from its concern about increased usage rates. *See* App. 22a-24a. As the agency appropriately recognized both in 1977 and 1981, adverse public reaction affects not only usage rates "but also the general public attitude toward related safety initiatives" (App. 107a), threatening a "'poisoning of popular sentiment.'" App. 108a (quoting Coleman Decision). It would also "be difficult to term 'practicable' a system like the ignition interlock that so annoyed motorists that they deactivated it." *Pacific Legal Foundation v. DOT*, 593 F.2d 1338, 1346 (D.C. Cir.), *cert. denied*, 444 U.S. 930 (1979). Requiring nondetachable belts would be a futile exercise if widespread fears of entrapment led to physical destruction of seat belts by large numbers of motorists. *See* MVMA Br. 45 n.88; 44 Fed. Reg. 77210, 77217 (December 31, 1979) (public acceptability of passive belt systems would prevent belt cutting).

nondetachable belts permeates State Farm's brief. *Id.* at 10-11, 19, 20-23, 24, 24 n.24, 25, 26, 28, 38. In fact, detachable belts are not new, and almost all the belts "already in service" that State Farm calls "nondetachable" are actually detachable. The increases in usage rates for these belts result from the use of ignition interlocks and also from the self-selection of those purchasers who voluntarily paid for such systems.

Both active and passive belt systems have traditionally been detachable by a push-button release mechanism, for reasons recognized by NHTSA since 1971 and reiterated by the agency in this case. *See* MVMA Br. 43-45. Detachable passive belts have never been viewed by NHTSA as "poorly designed";[22] indeed, the agency *required* detachability for passive belts as long ago as 1974. *See id.* at 44. Administrator Claybrook recognized in 1979 that the push-button release mechanism of detachable passive belt systems "is important for exit purposes in emergency situations."[23] And a July 1980 report by NHTSA specifically endorsed as an "encouraging . . . feature" the detachable passive belt design developed by Irvin Indus-

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[22] State Farm notes that a NHTSA document describes certain detachable belt systems as "poorly designed." State Farm Br. 25. This statement was that certain systems "have been poorly designed *and* include a detachable feature." R. 2548 (emphasis supplied). The source of this comment was Ford Motor Co., and the reference was to more coercive belt systems, designs which Ford and others believed would have adverse effects on usage rates. *See Automatic Crash Protection Standards: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 41-43 (1981). *See also* R. 1418-19. As Administrator Peck explained in connection with this remark, "We did not and have not characterized a particular . . . design as poor." Tr. of Hearing, August 5, 1981, at 24-25.

[23] *NHTSA—Authorization and Oversight: Hearings on H.R. 2585 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 13 (1979).

tries that was ultimately selected to be installed by a number of manufacturers. R. 1629.[24]

Nondetachable belts, on the other hand, were *prohibited* by NHTSA until November 1978. At that time, the agency granted a petition by General Motors to permit manufacturers to "experiment" in the development of a spool release belt that would play out in an emergency, so that it could be test marketed to determine its acceptability to new car customers.[25] As State Farm itself recognizes (State Farm Br. 6 n.6), however, the three-point passive belt ultimately installed by GM in certain of its 1980 Chevettes was *not* a nondetachable system. While the three-point passive belts on these 1980 Chevettes can be played out from their stored position, they can also be detached by a conventional pushbutton release mechanism located on the belt where it attaches to the bottom of the door.[26] Once detached, these belts must be manually reattached to become effective passive belts.

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[24] State Farm lifts from its context NHTSA's observation that in April 1981 "there are no detachable systems currently available" (R. 107), suggesting that this meant that there were many nondetachable systems "currently available." State Farm Br. 24 n.24. All NHTSA was saying here was that no cars then in current production were equipped with detachable passive belts (other than those equipped with interlocks), and thus that predicting usage rates in advance was extremely difficult. As we show below, there were hardly any nondetachable passive belt cars then in service, either.

[25] 43 Fed. Reg. 52493 (November 13, 1978). GM's petition sought to "facilitate a more complete evaluation of such alternatives prior to the effective dates of the passive restraint mandate," and particularly to permit greater "insight into the question of acceptance by seat belt *users*." R. 2561 (emphasis in original). GM's concerns about public acceptability of coercive belt designs proved to be well founded based upon the results of its experiment. *See* note 29 *infra*.

[26] This push-button release mechanism is depicted in the illustration of the 1980 Chevette system reprinted as an appendix to NAII's brief. *See* NAII Br. App. 2a.

Toyota is the only manufacturer that has ever actually sold nondetachable belt systems following NHTSA's November 1978 order first permitting such systems. Toyota installed a sophisticated and expensive *shoulder* belt spool release system, driven by an electric motor, as an option on "a small number" of 1980 Corona sedans, and later as standard equipment for the shoulder belt on its more expensive 1981 Cressida. R. 304, 1628.[27] The record before the agency does not indicate how many consumers had bought these nondetachable Toyota shoulder belt systems (*see* App. 18a n.12; R. 85), but it was certainly quite low.[28] Toyota's own survey of prospective customers led it to conclude that "even with this sophisticated system we are achieving a disappointing level of public acceptance."[29]

Other "nondetachable" belt systems State Farm describes as "already in service" are actually the 358,000 VW Rabbits and GM Chevettes that, as the court of appeals noted, came "equipped with *detachable* passive seatbelts that were guarded by an ignition interlock." App. 18a n.12 (emphasis supplied); *see also* State Farm Br. 6, 20. These ignition-interlocked systems may be "practically" nondetachable (State Farm Br. 20), because of the

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[27] Even the Toyota system contains a push-button release for the separate active lap belt portion of the system. *See* R. 304, 1628; NHTSA, Automobile Occupant Crash Protection, Progress Report No. 3, July 1980, at 28.

[28] NHTSA's principal survey contractor, Opinion Research Corporation, was unable to find "[a] sufficient number of Toyota owners [with automatic restraint systems] for sampling purposes during the data collection period." R. 1002.

[29] R. 305. GM also found "substantial consumer resistance" even to its *detachable* spool-type system. R. 1441. The 1980 Chevette was the first (and the only) GM car equipped with this system. Less than 13,000 of GM's 415,000 1980 Chevettes (*i.e.*, 3%) were ever ordered with this feature, even though GM offered it to most customers at no additional cost, offered a $25 per car bonus to salesmen who persuaded customers to accept it, and spent over $1 million in advertising and marketing the system. R. 403; *see* App. 18a n.12.

use-inducing effects of interlocks.[30] NHTSA did not consider mandating such *detachable* but ignition-interlocked systems "already in service" in these Rabbits and Chevettes because, as NHTSA expressly recognized (App. 109a), Congress had clearly prohibited it in the 1974 amendments from issuing any such occupant restraint standard.[31]

3. Given the agency's longstanding commitment to detachable passive belt designs and the virtual nonexistence

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[30] As NHTSA found, even the usage rates evidenced in these interlock-equipped cars—like those for the spool-type systems—were skewed upwards, because of the self-selection bias associated with the owners of such systems. Many if not most of these purchasers requested the installation of their passive belt systems. R. 1020 (1980 model survey). *See also* R. 930 (1978 and 1979 model survey). And regardless of whether they knew in advance that they were buying passive belts, "[h]aving voluntarily invested in automatic restraints, [these purchasers] are more likely to use those restraints than someone who is compelled to buy them." App. 98a. The existence of such a self-selection bias was supported both by comments in the record (R. 1716, 1721) and by the agency's own prior judgment. *See DOT and Related Agencies Appropriations for 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 523 (1977) (Administrator Gregory): "[I]t must be remembered that purchasers made the choice to begin with, so the results are not very surprising."

[31] In the 1974 amendments, Congress proscribed any passive restraint standard that required or even permitted compliance by means of an interlock. 15 U.S.C. § 1410b(b)(1).

State Farm's assertion that NHTSA "concedes" that nondetachable systems would provide substantial safety benefits (State Farm Br. 20-23) refers principally to these detachable, interlock-equipped systems. *Id.* at 21. Petitioners join with respondents in deploring the tragic losses of life associated with the public's failure to use the active seatbelts now installed in virtually all passenger cars. Respondents' repeated assertions about the life-saving effects of passive belts, however, are premised upon the belt usage rates associated with these interlock-equipped systems that Congress has forbidden NHTSA from requiring. NHTSA has found, and the court of appeals has not disagreed, that no such usage rates can be predicted for detachable passive belts without such coercive features as interlocks.

of any truly nondetachable passive belt systems "already in service," prohibiting detachable belts was hardly a "logical outgrowth" of the agency's order proposing rescission. State Farm Br. 29. Nor was it "fully ventilated in the rulemaking." *Id.* at 30 & n.30.[32] But regardless of whether NHTSA was permitted to prohibit detachability in this proceeding, State Farm has failed to explain why it was ever obligated to do so.

As we have demonstrated, administrative agencies ordinarily have no obligation to propose rules or alternatives to existing rules. MVMA Br. 40-41.[33] State Farm

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[32] In fact, the agency's summary of "major comments" reflects no comments addressed to this issue. App. 121a-129a. State Farm's own comments urged that if the agency was concerned about usage rates for detachable systems, it analyze that issue "over the 1980-86 period":

> "If certain designs do not achieve a satisfactory rate of increased usage, the agency can *later* consider such additional steps as are necessary to ensure that the safety objectives of the Act are met. Such steps might include specific performance requirements that would minimize belt disconnection." R. 478 (emphasis supplied).

The manufacturers certainly were not apprised of the speculative possibility that the agency would ban detachable belts, a step that would have reversed the agency's long-standing endorsement of detachable belt systems. Their comments would have been critical to the issue, since amending Standard 208 to require installation of nondetachable belts would have forced them to redesign their assemblies. *See* MVMA Br. App. 40, 131, 134.

[33] In 1982, Congress considered (but did not adopt) amendments to the Administrative Procedure Act that would have required a description and discussion of alternatives to regulatory actions proposed by the agencies. S. 1080, 97th Cong., 2d Sess. §§ 3-4 (1982). The existing provisions of the APA, however, do not impose such a requirement. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544-45, 551 (1978). State Farm attempts to distinguish *Vermont Yankee* by asserting that the idea of mandating—as opposed to permitting—nondetachable belts "was neither novel nor complex." State Farm Br. 28. As we have shown above, however, this argument turns upon the totally erroneous premise that these "were the only kinds of passive [belts] that had been previously used." *Id.*

appears to concede this point, but replies that its proposed amendment of Standard 208 did not "address a new program" but would have "plug[ged] a loophole in [NHTSA's] existing program." State Farm Br. 28. This is the real nub of State Farm's position, and it begs the issue, because there is no loophole to be closed. This is not a case where failing to close a "loophole" or otherwise to consider a course of action would violate some statutory policy. *Cf. Pillai v. CAB*, 485 F.2d 1018, 1019 (D.C. Cir. 1973).[34] As we have shown, there is no congressional "mandate" for passive restraints that can be drawn either from the Safety Act itself or from the post-enactment legislative debates.[35] To say that amending the regulation is necessary to close a "loophole" presupposes a mandate for passive restraints that Congress has never established.

The majority noted below that NHTSA cannot function "as an umpire blandly calling balls and strikes," and that "[i]f NHTSA did not believe the standard as written would fulfill the standard's goals, its foremost obligation was to consider whether an amended standard could." App.

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[34] In *Pillai*, Congress had specifically provided the CAB with an alternative to endorsement of international ratemaking by carrier traffic conference agreements, *i.e.*, suspension of tariffs filed by foreign carriers to force bilateral negotiations with foreign aviation authorities. 485 F.2d at 1028-29. By ignoring this statutory tool, "the CAB did not actually or rationally choose among the possible alternatives, *as contemplated by Congress*." *Id.* at 1029 (emphasis supplied).

[35] *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), in which this Court held that the ICC had acted arbitrarily in remedying disruptions in service (resulting from union practices that violated federal labor law) by licensing additional carriers, without considering whether to impose cease-and-desist orders upon existing carriers. The ICC had therefore not only failed to remedy refusals to accept traffic that were "illegal and discriminatory" under the Interstate Commerce Act, *id.* at 166, but also may have "contravene[d] the national policy as to . . . labor relations" reflected in the "hot cargo" prohibitions of the National Labor Relations Act. *Id.* at 172-74.

56a. This presumption in favor of regulation in some form or another permeates the decision below. It fundamentally misperceives both the agency's "obligation" under the terms of the Safety Act and the proper role of the reviewing court. NHTSA's "obligation" is to issue, amend, and when appropriate rescind federal motor vehicle safety standards pursuant to the broad statutory criteria outlined above. The agency was not required to issue a standard mandating passive restraints—whether as provided in Standard 208 or as the majority would now have that standard amended. The majority's view arrogates to the judiciary the agency's statutory discretion to determine what regulatory proposals it should consider. That view is flatly contrary to the principles of primary jurisdiction long established by this Court.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed and NHTSA's order rescinding the passive restraint requirements of Standard 208 should be upheld.

Respectfully submitted,

Of Counsel:

WILLIAM H. CRABTREE
Vice President and
General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers
Association of the
United States, Inc.

FORREST A. HAINLINE, JR.
Vice President and
General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Senior Staff Counsel
Chrysler Corporation

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

HENRY R. NOLTE, JR.
Vice President—
General Counsel
JAMES M. MACNEE, III
Associate General Counsel
DONALD G. MCGUIGAN
Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and
General Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
DONALD M. SCHWENTKER
LANCE E. TUNICK
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007

Counsel for Petitioner
Automobile Importers of
America, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

RONALD A. ZUMBRUN
PACIFIC LEGAL FOUNDATION
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN, *Counsel of Record*
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners
Consumer Alert and Pacific Legal Foundation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONERS CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION

I. DESPITE RESPONDENTS' ATTEMPT TO GLOSS OVER THE ISSUE, THE UNPRECEDENTED STANDARD OF REVIEW APPLIED BELOW SHOULD BE INVALIDATED BY THIS COURT

This case presents two basic issues: (1) Did the Court of Appeals validly overturn the National Highway Traffic Safety Administration's (NHTSA) rescission of the passive restraint rule; and (2) if not, should NHTSA's decision be upheld by this Court?

The respondents all agree that this second issue should be addressed; in fact, they uniformly characterize it as being the ultimate issue before the Court. Brief of State Farm Mutual Automobile Insurance Co., *et al.* (State Farm), at 18-19; Brief for National Association of Independent Insurers, *et al.* (NAII), at 40. At the same time, their defense, or rather lack of defense, of the Court of Appeals' decision suggests that they recognize

the indefensible nature of the standard of review applied by that court.[1] Indeed, State Farm brushes aside challenges to the Court of Appeals' analysis as "irrelevant," apparently viewing that analysis itself as irrelevant to this "intensely factual case." State Farm Brief at 13.

However intense the facts of this case may be, they should not overshadow the legal issues. This Court's intervention is warranted in regard to both the result reached *and* the standard of review applied by the court below. That standard, based on *post hoc*, unenacted congressional reaction, should be explicitly invalidated as contrary to law, for it constitutes precisely the sort of judicial action which calls for correction by this Court.[2] The perfunctory manner in which the respondents have defended their own victory below may commendably reduce argument on this issue, but it should not serve to sweep the issue under the rug.

II. RESPONDENTS HAVE PRODUCED NO BASIS FOR SUPPLANTING NHTSA'S JUDGMENT OF PUBLIC REACTION WITH THEIR OWN INTERPRETATION OF THE RECORD

The support in the administrative record for NHTSA's rescission has already been briefed before this Court; it is not undercut by respondents' arguments. At best, those arguments suggest only that differing conclusions can be drawn from some of the data. However, the "possibility of drawing either of two inconsistent inferences from the evidence does not prevent [an agency] from drawing one of them . . . ." *National Labor Relations Board v. Nevada Consolidated Copper Corporation*, 316 U.S. 105,

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[1] While the decision below is mentioned a number of times throughout respondents' briefs, only 6 of their combined 75 pages of argument are devoted to a detailed defense of the lower court's opinion on the merits. *See* NAII Brief at 40-45.

[2] *See e.g., Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 491 (1951): "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

106 (1942). More often, as is shown below, respondents' arguments turn out to be contradicted by the very documents they are based on, as well as by previous positions taken by members of the insurance industry.

NAII, for example, claims that NHTSA "ignored both the record and common sense" when it determined that seat belt use would not increase significantly with detachable automatic belts. NAII Brief at 18. Pointing to certain surveys of public attitude, NAII argues that the reasons which people currently give for not wearing seat belts, such as "bothersome," "inconvenient," "forgot," and "too much time/hassle," simply do not apply to automatic belts. NAII Brief at 19-20, *citing* the joint appendix below (C.A.J.A.) at 81, 1110. Admittedly, some of these factors, such as "forgot" and "too much time," appear to relate solely to the active buckling necessary for conventional belts and thus may be eliminated by passive belts. This is not true of the other responses. The bother and inconvenience which people reported for belts are applicable both to buckling *and wearing* those devices.[3] These factors would not be eliminated by automatic belts, nor would such other widely reported factors as discomfort and the fear of being trapped. *See* C.A.J.A. at 81, 1110. Even State Farm admits that, if these reasons are sufficiently widespread, then NHTSA's judgment of low probable belt use "may well be true." State Farm Brief at 39.

NHTSA had determined that one reason for low current belt use rates was a "widespread . . . fear in many members of the public that they could be trapped by the

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[3] This is also evident from the explanatory comments reported in the category of "too much time/hassle." *See* C.A.J.A. at 1113. While some of these additional comments, such as "I never take the time to put [belts] together . . .", relate to the necessity of manual buckling, others do not. For example, the reported observation that "you feel like you are going into a war zone or something" (*id.*) could well describe someone's perception of automatic as well as manual belts.

seat belt after a crash." 46 Fed. Reg. 53,419, 53,424 col. 3 (1981), Appendix to Petition for Writ of Certiorari of the Motor Vehicle Manufacturers Association, *et al.* (MVMA App.) 88a, 110a. Passive belts would not alleviate this fear, and a requirement that passive belts be nondetachable (as the respondents advocate) could only "heighten or trigger that concern." *Id.*

Both NAII and State Farm dismiss this fear as being reported by "only 7%" of the respondents in the 1981 National Seat Belt Study. NAII Brief at 22; State Farm Brief at 34. However, this factor was the fourth most frequent response in this survey (out of 13 total responses). *See* C.A.J.A. at 1108-09. An earlier study found a similar concern, that "belts are dangerous," to be the third most common of seven responses. C.A.J.A. at 81. More importantly, when people were asked to evaluate the *importance* of this fear in the 1981 study, 48% viewed it as "very important" and another 31% rated it as "somewhat important." C.A.J.A. at 1109. When raised in this manner by the pollsters, this issue became "*the* most important explanation" of belt nonuse (C.A.J.A. at 1152 (emphasis added)), a "fairly dramatic difference" which the authors of the study noted (*id.*) but which NAII ignores and State Farm buries in a footnote.

In short, NAII's cavalier claim that the reasons for low belt use are "of course . . . the very excuses that are eliminated by an automatic seat belt" is belied by the very surveys which NAII cites. NAII Brief at 20.

State Farm attacks NHTSA's reliance on volunteerism to partly explain the belt use increase in those passive belt-equipped Rabbits and Chevettes purchased to date. It was NHTSA's view that people who "voluntarily invested in automatic restraints . . . are more likely to use those restraints than someone who is compelled to buy them." 46 Fed. Reg. 53,421 col. 3, MVMA App. at 98a. According to State Farm, "[t]he record discredits this assertion . . . ." State Farm Brief at 41. Yet other

insurance companies saw things differently in the past. In 1978, commenting on Volkswagen's use of ignition interlocks with its passive belts, the Prudential Property and Casualty Insurance Company stated:

> "Thirty percent of those drivers currently driving passive belt-equipped Rabbits, who presumably made a conscious decision to have passive belts, have managed to defeat them. *Less willing drivers* of cars with Rabbit-type systems *will defeat the system more often* and/or generate a serious backlash against the passive restraint mandate." C.A.J.A. at 1716 (emphasis added).

The same point was made by the Alliance of American Insurers:

> "We already know that some people remove or fail to use the passive belts voluntarily purchased as an option on the Volkswagen Rabbit. It would be logical to expect the 'defeat rate' to increase when the passive belts become mandatory purchase items." C.A.J.A. at 1721.

It is State Farm, and not NHTSA, which the record discredits on this point.

Both NAII and State Farm rely on several cost-benefit analyses to argue against NHTSA's judgment of future belt use. According to State Farm, "every cost-benefit analysis ever conducted on passive restraints" has concluded that use rates would increase sufficiently to make the benefits of passive restraints outweigh their costs. State Farm Brief at 22, *citing* U.S. Congress, Office of Technology Assessment, *Technology and Handicapped People: Background Paper No. 1* (1982) (OTA Background Paper); *see also* State Farm Brief at 24-25 n.25, 43 n.45; NAII Brief at 35 n.37. Yet as the OTA Background Paper points out, these cost-benefit analyses rest on "basic assumptions" which have been challenged by "articulate critics." OTA Background Paper at 34. In fact, "most of the criticism is focused on estimates of passive seatbelt use" (*id.*), a factor which the lower court

identified as the key issue in this case.[4] There is no ground for displacing NHTSA's judgment on this basic issue with the assumptions of outside economists.

The same cost-benefit analyses which the respondents cite undercut another of their contentions. On the basis of certain public opinion polls, NAII claims that NHTSA "ignored the evidence that a substantial segment of the population would in fact choose automatic protection for themselves if it were given the opportunity." NAII Brief at 33; *see also id.* at 20-22, 35 n.38; State Farm Brief at 40 n.40. Yet as one cost-benefit analysis, the Graham Study, points out, there are numerous reasons why "analysts should *not* place a great deal of confidence" in surveys of this type. C.A.J.A. at 629-30 (emphasis added). Among these are the unstable nature of expressed preferences, the difficulty of interviewees' dealing with low-probability events, and the susceptibility of peoples' responses to "manipulation by various techniques." *Id.* at 630; *see also id.* at 639-40. The Graham Study is cited by State Farm for other purposes (State Farm Brief at 21 n.20, 25 n.25), but its conclusions on this point clearly justify (if further justification were needed) NHTSA's decision not to rely on these survey results.

State Farm and NAII reserve their harshest attack for NHTSA's consideration of general public reaction. In the previous litigation over Standard 208, the court ruled that NHTSA "cannot fulfill its statutory responsibility unless it considers popular reaction." *Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, 1345 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). The agency did precisely this in the instant rulemaking. Now it stands accused by the respondents of subjecting Standard 208 to "popularity contests" and "implied public

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[4] The Court of Appeals stated that "[t]he rationality of NHTSA's conclusion about the standard as written *depends entirely* on how well its third step—predicting usage rates with detachable belts—holds up." Opinion below, 680 F.2d 206, 231 (D.C. Cir. 1982) (emphasis added), MVMA App. 1a, 51a.

referend[a]." State Farm Brief at 36 n.36; NAII Brief at 33. In fact, respondents' argument with NHTSA is nothing more than disagreement over a matter of judgment, plain and simple.

For example, State Farm attacks NHTSA's view that the ignition interlock fiasco demonstrated the danger of public backlash against unacceptable safety standards. In NHTSA's words, this could create " 'a poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future.' " 46 Fed. Reg. 53,424 col. 2, MVMA App. at 108a, *quoting* former Secretary of Transportation Coleman. According to State Farm, there is no such "lesson" to be learned from this costly episode, because the "so-called 'ground swell' of protests" that arose over the interlocks " 'actually involved much fewer than 1% of the new car market . . . .' " State Farm Brief at 35 n.35 (citation omitted).

NHTSA, however, was not the first to draw the lesson it did from this episode. That lesson had been drawn in 1976 by Secretary Coleman, and it was embraced soon thereafter by several insurance companies as well. The Allstate Insurance Company, an NAII member,[5] declared that the ignition interlock rule "was so bad, the reaction against it almost killed the entire vehicle safety effort." C.A.J.A. at 1920. The threat of a "serious backlash against the passive restraint mandate" due to passive belt interlocks was also noted by the Prudential Company. C.A.J.A. at 1716. That view may now be inconvenient for the respondents, but it is not arbitrary.[6]

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[5] *See* NAII, Appendix to Brief in Opposition to Petitions for Writs of Certiorari at 1a.

[6] Given this expressed popular hostility towards being forced into belts, and given NHTSA's consideration of this factor, State Farm has no basis for characterizing the implications for nondetachable belts as a "*post hoc* justification entitled to no weight." State Farm Brief at 35. State Farm is also wrong in claiming that "as a practical matter, passive restraints simply are not available for those who want to buy them . . . ." *Id.* at 44 n.47. The admitted avail-

Similarly, the Center for Auto Safety attacks as "especially disingenuous" NHTSA's concern "that nondetachable belts would hinder emergency egress." Brief of Amicus Curiae Center for Auto Safety, *et al.* at 14. The disingenuousness belongs entirely to the Center; in 1978 *it* stated that "a system that does not allow belt separation may result in cases of egress problems . . . ." C.A.J.A. at 1709. While it was the Center's view that "anti-defeat features should be given a higher priority over egress features" (*id.* at 1710), NHTSA was clearly entitled to make its own assessment of these competing factors.[7]

NHTSA also based its decision on considerations of equity. A passive restraint mandate

> "would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint usage." 46 Fed. Reg. 53,424 col. 2, MVMA App. at 109a.

State Farm derides this as a "theoretical objection" which "pales in comparison to" other factors. State Farm Brief at 43. However, it is NHTSA's function, and not the respondents', to "consider many variables, and make 'trade-offs' between various desiderata in deciding upon a particular standard for auto safety." *Automotive Parts and Accessories Association, Inc. v. Boyd*, 407 F.2d 330, 342 (D.C. Cir. 1968). State Farm's claim that "insurance-premium reductions . . . *could* exceed the cost of the new belts" is, as its own choice of words indicates, specu-

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ability of these devices on "a few models" (*id.*; *see also* NAII Brief at 7 n.11) is clearly a starting point for the satisfaction of whatever public demand there is for them.

[7] NHTSA has "authority to balance present injuries against possible risks posed by safety equipment." *Pacific Legal Foundation*, 593 F.2d at 1346.

lative. State Farm Brief at 43 (emphasis added). As the authors of another document cited by respondents admit, the equitable "issue of *who* benefits and *who* loses . . . from implementation of a passive restraint rule . . . has made a (slow) horse race out of what appears to be a socially desirable objective." OTA Background Paper at 34 (emphasis in original). It is both NHTSA's prerogative and its duty to judge that race, and it has done so.

III. CONTRARY TO RESPONDENTS' ASSERTIONS, NHTSA'S DISCRETION IS NOT FROZEN BY THE HISTORY OF THE PASSIVE RESTRAINT MANDATE

Despite the varying and sometimes contrary decisions on Standard 208 which have been made by successive administrations, the respondents persist in transmuting the history of this issue into an administrative straitjacket. NAII characterizes NHTSA's action as a "complete reversal of direction from a course it had followed for over a decade;" State Farm claims the agency has "abandoned a 12-year commitment to auto safety." NAII Brief at 42; State Farm Brief at 37. This approach carries as little respect for new facts and new administrators as it does for history. Even in the absence of changed circumstances, "[a]dministrators, no less than judges, may differ in their views on the same subjects without becoming arbitrary . . . ." *Herbert Harvey, Inc. v. National Labor Relations Board*, 424 F.2d 770, 783 (D.C. Cir. 1969).

> "Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational . . . . All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary." *Pinellas Broadcasting Company v. Federal Communications Commission*, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

In this case *the facts* have changed as well. A regulation that "was once called the 'air bag standard'" (NAII Brief at 37 (citation omitted)) was about to become, in effect, a passive belt standard. When NHTSA decided that this standard would not work because of public reaction, it was engaging in a legally required analysis of an issue uniquely committed to administrative judgment. As was stated in *Pacific Legal Foundation*, NHTSA

> "cannot fulfill its statutory responsibility unless it considers popular reaction. Without public cooperation there can be no assurance that a safety system can 'meet the need for motor vehicle safety.' And it would be difficult to term 'practicable' a system, like the ignition interlock, that so annoyed motorists that they deactivated it.
>
> "... In the 1976 decision Secretary Coleman characterized his estimate of public resistance as 'a matter of judgment.' In our view Secretary Adams provided a sufficient explanation of why his judgment differed from his predecessor's." 593 F.2d at 1345-46 (citations omitted; footnotes omitted).

A new administrator has now made his own judgment of public reaction, similar to that of Secretary Coleman, differing from that of Secretary Adams. His decision, no less than those of his predecessors, is entitled to judicial validation.

CONCLUSION

In attacking NHTSA's assessment of the evidence, State Farm and NAII have established only that they disagree with the agency. Flawed as their own interpretation of the record is, the respondents are entitled to their opinions. They are *not* entitled to have those opinions displace NHTSA's judgment, a result reached under the Court of Appeals' creation of an unprecedented and unfounded standard of review. For these reasons, the decision of the Court of Appeals should be reversed, and NHTSA's rescission of the passive restraint mandate should be affirmed.

Respectfully submitted,

RONALD A. ZUMBRUN
PACIFIC LEGAL FOUNDATION
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
SAM KAZMAN, *Counsel of Record*
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Petitioners
Consumer Alert and
Pacific Legal Foundation

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In the Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Respondents obscure the legal issues presented for review by largely ignoring the decisions of the court of appeals and agency. Instead, they present an array of facts selectively drawn from the record. These facts either are irrelevant or were determined by the Administrator not to be reliable indicators that the passive restraint requirements of Standard 208 would be effective. This Court does not ordinarily sift an extensive and complex administrative record to determine whether the agency has correctly weighed and analyzed the facts, and there is no reason for the Court to do so here.

Although the experience of the NHTSA's and Congress's consideration of passive restraints has been extensive and controversial, and the factual, predictive, and technical aspects of the question have been complex, variable, and sometimes contradictory, a detailed analysis of these matters is not necessary in order to expose the fundamental flaws in the court of appeals' unprecedented legal holdings. To the contrary, the reasonableness of the agency's decision is most fully understood when the case is stripped to its essentials. We therefore begin by focusing again on those essentials.

1. a. The Administrator of NHTSA was confronted in 1981 with a safety standard, scheduled to go into effect in the very near future, requiring the installation of passive occupant restraints in all newly manufactured automobiles. After soliciting comments and taking a fresh look at the standard and the industry compliance efforts it had spurred, the Administrator determined that the manufacturers in fact planned to comply with the standard by installing passive belts that could be permanently detached by the simple act—consuming only a second or two of time—of releasing a latch mechanism. Once detached in this fashion, the belts installed under the standard would be functionally identical to the manual belts required in new cars since 1967 (32 Fed. Reg. 2408, 2415), because they then would require the same affirmative conduct of "buckling up" by the occupant as

is required in order for manual belts to afford occupant protection. This similarity to manual belts was all the more troubling because the use of manual belts had actually declined significantly in recent years.[1]

The Administrator had substantial doubts that belts so readily detachable would be used significantly more often than manual belts (Pet. App. 99a, 101a, 104a, 113a), and he concluded that the anticipated $1 billion annual cost of the passive restraint requirement was not justified in the face of this substantial uncertainty (*id.* at 105a-107a, 115a, 117a). The Administrator also determined that going forward with the requirement under these circumstances could actually be counterproductive from a safety standpoint, because public attitudes toward passive restraints and safety initiatives generally could be poisoned by requiring a system that could prove to be of virtually no marginal benefit (*id.* at 107a-109a, 114a-115a). He therefore rescinded the particular mandatory passive restraint provisions embodied in Standard 208.

At the same time, the Administrator reiterated NHTSA's commitment to the goal of fostering automatic crash protection systems that will actually produce substantial safety benefits and to the continuing examination of other ways of improving occupant protection and fostering public acceptability in order to prepare the way for possible introduction of more effective passive restraint devices in the future (Pet. App. 107a-112a, 114a, 116a). Insurance companies like respondent State Farm would of course have nothing to lose if NHTSA had nonetheless permitted the passive restraint requirement to go into effect in the hope that it might in fact lead to

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[1] As the court of appeals observed (Pet. App. 14a), NHTSA estimated in 1977 that usage of manual belts was approximately 20% (42 Fed. Reg. 34290), but concluded in 1981 that the usage rate of such belts had declined to 11% (46 Fed. Reg. 53422).

some incremental gain in belt usage;[2] viewed from the broader perspective of the Nation as a whole, however, we do not see how NHTSA's rescission of the requirement could be viewed as anything other than sound and responsible.

b. Respondents attempt to deal with the Administrator's conclusions by suggesting that NHTSA should have amended Standard 208 to prohibit compliance by means of detachable belts—the means of compliance planned by virtually the entire industry—because of doubts about their utility. Insofar as they urge this solution, however, respondents *concede* that there was substantial uncertainty whether Standard 208 as it then stood should have been permitted to go into effect. Indeed, respondents' argument in this respect vividly illuminates the central reality of the situation as it stood in 1981—that there was significant doubt whether the 1977 solution to this infinitely complex problem was a sensible and effective one.

At this point, then, respondents' case depends on the proposition that it was arbitrary and capricious for the Administrator to rescind the passive restraint requirement of Standard 208 *before* turning to the question whether an alternative version of it—one prohibiting detachable belts—should be adopted. But no such proposition can seriously be maintained; the Administrator's discretion must surely include the option to rescind an ineffective regulatory solution before canvassing alternatives to it.

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[2] As NHTSA found (Pet. App. 106a), State Farm and many other insurance companies had not offered discounts for vehicles equipped with passive belts, pending an assessment of their effectiveness under a mandatory standard (see, *e.g.*, C.A. App. 1241-1242, 2550-2551). These companies have no hestitation, however, in asserting that *others*—automobile purchasers and manufacturers—should assume a financial burden in these same uncertain circumstances (State Farm Br. 39-42).

c. Respondents also ignore the fact that the agency action at issue here is but the most recent in a long line of varying administrative decisions rendered as NHTSA has grappled with the occupant restraint issue over the years. The requirement rescinded by the Administrator in 1981 had been adopted in 1977 by Secretary Adams, who in turn had reversed a decision rendered just six months earlier by then-Secretary Coleman *not* to require passive restraints because of his judgment that there would be widespread public resistance to such a standard at that time (Pet. App. 10a). Secretary Coleman's decision in turn was a departure from the Department's prior position, reflected in NHTSA's promulgation in 1972 of a standard that would have required installation of passive restraints in new cars. See Gov't Br. 3-5. Thus, the administrative history of passive restraints has been marked by frequent changes in direction by successive Secretaries of Transportation or Administrators of NHTSA, based on changed circumstances and differing assessments of the relevant circumstances.

Until the decision in this case, the courts of appeals had recognized the broad discretion of NHTSA to revise its approach to the occupant restraint problem in this manner. The Sixth Circuit, in sustaining the Secretary's initial decision to require passive restraints in 1972, made it clear that the matter was one within the Secretary's "administrative discretion" (*Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 674 (1972)) and stressed that if it appeared as the time for implementation approached that further testing or development was necessary, NHTSA was free to consider "whether to extend the time for implementation or to alter, or even to abandon, the project" (*id.* at 673).[3]

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[3] Although the court upheld the Secretary's authority to require passive restraints, it invalidated the particular standard at issue on the ground that it did not satisfy the statutory requirement that a standard be stated in objective terms. 472 F.2d at 675-678; see 15 U.S.C. 1392(a).

Similarly, in sustaining Secretary Adams' 1977 decision to reimpose the passive restraint requirement, the District of Columbia Circuit held that the proper standard of review was whether the Secretary's decision was "rational" and whether he had "abused his discretion" in assessing the relative benefits and detriments of airbags, which were then expected to be installed in 75% of all new vehicles. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1340 n.6, 1343, 1346-1347 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979). The court also held that the Secretary is required by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.* ("Safety Act") to consider the possible public reaction to passive restraints,[4] and viewed the estimate of public resistance as a matter of "judgment" for the Secretary (593 F.2d at 1346; see Secretary Coleman's 1976 Decision, C.A. App. 2119-2124).[5]

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[4] NAII's objection (Br. 32-34) to NHTSA's consideration of the public's reaction to the passive restraint requirement therefore is without merit.

[5] The court concluded that Secretary Adams had sufficiently explained why his judgment about the prospect of substantial adverse public reaction differed from the contrary judgment of Secretary Coleman just six months earlier; but the court did not suggest that Secretary Coleman's view that substantial public resistance would result--a view shared by the Administrator in this case—was in any way irrational (593 F.2d at 1342). Secretary Coleman, like the Administrator in the instant case, had reasoned that "[t]he issue of public acceptance deserves considerable weight in this decision because the consequences of a mistaken judgment are particularly severe" (C.A. App. 2120). Secretary Coleman believed, again like the Administrator here, that the experience with the ignition interlock systems mandated by the Department in 1973 and outlawed by Congress in 1974 demonstrated that actions requiring particular restraint systems may be judged as intolerable by the public (C.A. App. 2119). Secretary Adams, in contrast, had reasoned that public acceptability was not even a factor that was required to be considered under the Safety Act, a position flatly rejected by the court of appeals (593 F.2d at 1345-1346; see also note 11, *infra*), but the court nevertheless concluded that Secretary Adams had adequately explained why his judgment regarding public acceptability differed from that of Secretary Coleman:

Despite this background of experimental and shifting administrative positions reflecting the developmental nature of the problem, and the prior judicial decisions recognizing that the question whether to institute mandatory passive restraints presents questions of expert judgment and discretion for NHTSA, the court of appeals in this case intervened to freeze this evolution at the point of Secretary Adams' decision of almost six years ago. The court held that NHTSA's substantial uncertainty about the efficacy of the mandatory passive restraint standard promulgated in 1977 was not a sufficient reason for NHTSA to withdraw that standard. It insisted instead on affirmative proof by the agency that usage rates would *not* increase by an amount that would make the standard worthwhile, even though there is a conceded absence of any experience with the types of belts that would be installed under the standard that could form the basis for such a showing. With all respect, by reversing the respective roles of agency and court in this manner, it was the court of appeals, not NHTSA, that acted in an arbitrary and capricious manner.

2. a. Not surprisingly, respondents have sought to disassociate themselves from most of the court of appeals' reasoning. As an initial matter, respondents make no attempt to defend the court of appeals' unprecedented holding that the scope of discretion originally granted to NHTSA by the Safety Act to regulate in the area of occupant restraints—and in particular to revoke a passive restraint standard—was somehow constricted by subsequent legislative reaction to the passive restraint issue that the court itself acknowledged did not amount to "positive law" (Pet. App. 46a, 47a, 48a; see generally *id.* at 32a-46a). To the contrary, State Farm notes its agreement with our submission (Gov't Br. 46-47) that this

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Secretary Adams was of the view that the adverse reaction to the interlock requirement was based on the fact that it required affirmative action (buckling of a seatbelt), while passive restraints do not (593 F.2d at 1342, 1346).

post-enactment legislative history "does not heighten the standard of [judicial] review of NHTSA's actions" (State Farm Br. 13; see also *id.* at 37 n.38), and respondents National Association of Independent Insurers, *et al.* (NAII) likewise agree that it is the text and legislative history of the Safety Act as originally enacted that "define the limits of discretion available to NHTSA" (NAII Br. 45). Respondents thus have conceded that the rationale on which the court of appeals explicitly based its exacting standard of judicial review in this case (see Pet. App. 46a, 47a, 48a) is without merit.

Nor does State Farm or NAII make any effort to answer the detailed submission in our opening brief (Gov't Br. 42-46) that each of the post-enactment legislative incidents relied upon by the court of appeals in fact reflects a continuing and substantial opposition in Congress to a mandatory passive restraint standard, based on the view that it would be expensive and ineffective and constitute an unwarranted or irritating expansion of the regulatory role of government at the expense of personal freedom. This period of activity in Congress was marked by the repeated imposition or proposed imposition of legislative restrictions on the ability of NHTSA to implement a passive restraint standard in the face of strong public resistance (*ibid.*; Pet. App. 8a).[6] Thus, far from support-

[6] State Farm is wrong in asserting (Br. 36-37) that there is nothing in the legislative history of the 1974 amendments to the Safety Act to suggest that Congress' distaste for ignition interlocks extended to other forms of passive restraints. As we explain in our opening brief (Gov't Br. 42), those amendments had their origins in a floor amendment passed by an overwhelming margin that would have barred NHTSA from requiring passive restraints as well as ignition interlocks. 120 Cong. Rec. 27815, 27822-27823 (1974). The provision in the law as eventually enacted for a legislative veto of any imposition of a nonbelt passive restraint standard in the future (15 U.S.C. 1410b(b)(3), (c) and (d)) was a compromise reflecting the fact that such systems, unlike the ignition interlocks that were prohibited by the 1974 amendments (see 15 U.S.C. 1410b(b)(1)), had not yet been installed on a widespread

ing the judgment below, as respondents now only weakly suggest (State Farm Br. 37 n.38; NAII Br. 45), the consistently controversial nature of the issue in the most representative branch of government over the last decade strongly reinforces NHTSA's doubts about the public acceptability of mandatory passive restraints and NHTSA's resulting fears that Standard 208 would lead to a poisoning of popular sentiment toward future efforts to improve occupant restraint systems in particular and safety measures in general (Pet. App. 107a-109a; C.A. App. 2073 (Secretary Coleman's 1976 Decision)).

b. Respondent State Farm also expressly concedes (Br. 12-13, 38) that the burden of proof in this case rested on those challenging NHTSA's decision, not on the agency, and that a regulation may be rescinded if there is substantial uncertainty whether it will work as expected. State Farm thus has effectively acknowledged that the court of appeals' decision must be reversed, because the court of appeals' judgment rests on that court's contrary holding with respect to these two issues (Pet. App. 51a-54a).

NAII likewise eschews reliance on any general principle that substantial uncertainty is an inadequate basis for an agency to rescind a rule. Unlike State Farm, however, NAII attempts to justify the court of appeals' decision placing the burden on NHTSA in this case to prove that its own regulation will not be effective by arguing that NHTSA was reversing an assertedly "'settled course'" that had been followed by the agency for over a decade (NAII Br. 41-42, quoting *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807 (1973)). This argument fails for three reasons.

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basis and that NHTSA had not yet decided whether to mandate them. See Gov't Br. 42-43; 120 Cong. Rec. 27819-27820, 30558, 30837-30839, 30845, 30849, 35637 (1974). Congress' failure to prohibit passive restraints in 1974 therefore scarcely can be viewed as an expression of congressional approval of them.

First, as we have explained above (see page 5, *supra*) and in our opening brief (Gov't Br. 34-35), there plainly has not been a settled administrative course by NHTSA of mandating passive restraints. There has been a repeated changing of course on that question. Second, notwithstanding the rescission of the particular passive restraint requirement adopted in 1977, NHTSA has not abandoned its longstanding commitment to developing automatic crash protection that will be truly effective.[7] Installation of passive restraints continues to be one means by which a manufacturer may comply with Standard 208 (see 49 C.F.R. 571.208, para. S4.1.2.1), and the agency intends to explore ways of increasing the public acceptability of such systems in the future.

Third, even if NHTSA's action were viewed as a departure from a settled administrative course, the Court made clear in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, *supra*, that an agency may "flatly repudiate [prior] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy." 412 U.S. at 808. Although an agency must explain its actions in that event (*ibid.*), NHTSA fully did so here.

c. NAII also suggests (Br. 42) that the court of appeals' holding prohibiting NHTSA from modifying or revoking a regulation because of doubts that the regulation would be effective is appropriate under the Safety Act even if such a holding might not be appropriate under other regulatory statutes. This argument is flatly contradicted by the terms of the Safety Act itself. In order for the Secretary to impose a safety standard, he must find that it is "practicable," will "meet the need for motor vehicle safety," and be "reasonable, practicable and ap-

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[7] NHTSA's budget submission to Congress for Fiscal Year 1984 includes a request for more than $7.5 million for research and development in the area of "crashworthiness," which includes occupant restraints. U.S. Department of Transportation, *Budget Estimate, Fiscal 1984 (NHTSA)* 67 (1983). See also Gov't Br. 12 n.12.

propriate" for the particular type of vehicle. 15 U.S.C. 1392(a) and (f)(3); see also 15 U.S.C. 1391(1) and (2).[8] Because of uncertainties regarding the incremental usage rates of detachable belts and the significant possibility of adverse safety consequences, NHTSA was unable to make the requisite affirmative finding that the standard would meet the need for motor vehicle safety.[9] In view of the $1 billion annual cost of the standard, NHTSA likewise could not find that a standard having such speculative benefits would be "reasonable" or "practicable." See Gov't Br. 8-11. The Safety Act simply cannot be read nonetheless to compel the Secretary to institute or retain a safety standard in these circumstances.

NAII ignores these statutory prerequisites for the issuance of a safety standard and relies (Br. 10 n.12, 13, 14, 42) instead on the language of the Act providing that NHTSA "*shall* establish by order appropriate Federal Motor vehicle safety standards." 15 U.S.C. 1392(a) (emphasis added). From this, NAII apparently intends to suggest (Br. 14-16, 27-28 & n.30, 32-34, 35-36, 39-40) that the Secretary has a duty to issue a safety standard—and in particular a passive restraint standard to address the problem of the "second collision" between the occupant and the interior of the vehicle[10]—largely without regard to such factors as public acceptability and cost. See also State Farm Br. 19-20, 29. This argument overlooks the fact that 15 U.S.C. 1392(a), the section which provides that the Secretary "shall" issue safety stand-

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[8] Cf. *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 653 (1980) (opinion of Stevens, J.); 5 U.S.C. 556(d).

[9] The appropriateness of attaching importance to the potentially minimal safety benefits of the standard also is demonstrated by the requirement that the Secretary consider "the *extent* to which such standards will contribute to carrying out the purposes of [the Act]." 15 U.S.C. 1392(f)(4) (emphasis added).

[10] See, *e.g.*, H.R. Rep. No. 1776, 89th Cong., 2d Sess. 10-11 (1966); S. Rep. No. 1301, 89th Cong., 2d Sess. 3 (1966).

ards, is also the section which provides that each such standard "shall" be appropriate, practicable, and meet the need for motor vehicle safety. Thus, respondents' argument regarding the mandatory nature of the word "shall" in 15 U.S.C. 1392(a) only reinforces the conclusion that the Secretary's responsibility for issuing safety standards must be exercised within the limits of cost, public acceptability, and the likelihood of resulting safety benefits that are established by the requirements of appropriateness, practicability, the need for safety, and the other criteria listed in 15 U.S.C. 1392(f).[11]

In addition, it is particularly clear that Congress, in enacting the Safety Act, did not intend to require NHTSA to issue a passive restraint standard. Compare 15 U.S.C. 1392(i). The 1974 amendment to the Act that subjects any future nonbelt passive restraint standard to a legislative veto (15 U.S.C. 1410b(b)(1)) obviously rests on the premises that the Act itself did not mandate such a standard and that whether to issue one remains within the discretion of the agency through application of the ordinary statutory criteria. Furthermore, the legislative history of the 1966 Act indicates that it was contemplated that NHTSA could address the problem of the "second collision" by mandating certain interior design changes as well as seatbelts (S. Rep. No. 1301, *supra*, at 3; H.R. Rep. No. 1776, *supra*, at 10-11); in fact NHTSA has followed this course (see 49 C.F.R. Pt. 571). There also is no indication in the legislative history that Congress had passive restraints in mind when it enacted the Safety Act in 1966. Such technology was largely unknown except in the research community, and it presumably did not become a subject of broad public discussion until after NHTSA published an advance notice of proposed rulemaking in 1969. 34 Fed. Reg. 11148. NAII's efforts to find support in the Safety Act for the burden-

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[11] See S. Rep. No. 1301, *supra*, at 3, 6; H.R. Rep. No. 1776, *supra*, at 16; see also Gov't Br. 19 n.16. The Senate Report (at 3) stresses, for example, that "the public willingness to use safety devices, such as seat belts," is a critical factor.

shifting rule adopted by the court of appeals therefore is without merit.

3. In an effort to salvage the judgment below notwithstanding their admissions that the court of appeals committed a number of legal errors, respondents take issue as a factual matter with NHTSA's determination that there was substantial uncertainty whether usage rates would increase significantly under Standard 208. State Farm Br. 39-42; NAII Br. 18-25. The court of appeals did not disturb this determination, however, acknowledging that there may well be substantial uncertainty about the usage rates that can be predicted if, as NHTSA found, detachable belts would be widely used under the Standard (Pet. App. 51a). This Court need not review this question of administrative judgment. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Langnes* v. *Green*, 282 U.S. 531, 537 (1931); cf. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 522-523 (1981).

In any event, the question is not whether the reviewing court might reach a different conclusion than did NHTSA because it is more confident than NHTSA that substantial safety benefits would materialize. The question is whether NHTSA rationally could have believed that sufficient uncertainty existed regarding possible safety benefits to counsel withdrawal of the passive restraint requirement before its compliance date arrived. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). There can be little doubt that this test is satisfied here.

A sufficient basis for the uncertainty NHTSA found was established by the Administrator's determination that the belts that would be installed under Standard 208 could be permanently detached with ease and thereafter would be functionally identical to the manual belts that had experienced declining usage in recent years.[12] Simply

[12] NAII contends (Br. 25-26) that detachable belts in fact are not functionally identical to manual belts even after they are de-

as a matter of common sense, the Administrator could not be confident that a belt system whose passive feature was so transparently avoidable would, over time, make any significant incremental difference in seat belt usage, much less a difference approaching that necessary to warrant the expenditure of $1 billion annually for such systems.

Respondents contend, however, that NHTSA should have ignored these well-grounded concerns about the marginal utility of detachable belts and predicted a high usage rate for them based on extrapolations from data relating to quite different types of restraints (NAII Br. 18-25; State Farm Br. 39-42). State Farm, for example, cites (Br. 20-21, 39) studies conducted between 1977 and 1981 of usage rates of optional detachable belts in Volkswagen Rabbits that also were equipped with ignition interlocks to compel reconnection of the belts if they were detached. These studies revealed usage rates averaging 84% for the automatic belts, as compared with usage rates of 34% in Rabbits equipped with manual belts. Similar studies of a much smaller number of Chevrolet Chevettes equipped with optional ignition interlocks or belts that were only partially detachable and had a spool-out device for emer-

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tached, because Standard 208 requires that an automatic belt system be accompanied by a flashing or continuous warning light if the belt is detached until it is either reattached or pulled out. 49 C.F.R. 571.208, para. S4.5.3.3. The court of appeals, however, specifically sustained NHTSA's conclusion that a detached belt and manual belt would be functionally identical (Pet. App. 50a). Moreover, the only record evidence NAII cites in support of its argument is a survey of 18 rental cars in Florida in which shoulder belts connected to a continuous light were used 23% of the time as compared with a usage rate of 13% for manual belts that were not so connected (C.A. App. 94-95). However, as NHTSA explained in its July 1, 1982 filing in the court of appeals, a rental car survey may not be reliable because of demographic considerations and the likelihood that drivers would tolerate a novel system for the short period of the rental (Pet. App. 146a). The Florida survey NAII cites itself recognized that it showed only that a use-compelling feature can "have an effect on first time usage of a system" (C.A. App. 94). This isolated survey showing only a 10% increase in usage therefore is of little significance here.

gency egress recorded a usage rate of between 67% and 72%, as compared with a usage rate of 11% for manual belts in such cars. See Pet. App. 18a-20a & nn. 12-14, 95a-96a; C.A. App. 85-93, 108, 824, 871, 922, 1012. As NAII concedes (Br. 20), however, NHTSA devoted "considerable attention" to these studies. After doing so, it concluded that the available data were of "limited utility in attempting to make any reliable predictions about the usage of easily detachable automatic belts" (Pet. App. 97a). Its reasons for reaching this conclusion were, at the very least, not irrational.

NHTSA determined that the most important factor causing the higher usage rates in the vehicles involved in the studies was that the detachable belts in the Rabbits and Chevettes were equipped with an interlock to compel reattachment and that the remaining Chevette belts were not even fully detachable in the first place. Based on prior data, not contested by respondents, concerning the use of belts in the model year 1974 and 1975 automobiles that were required to have interlocks under Standard 208 until that requirement was overturned by statute in 1974, NHTSA estimated that these features probably accounted for four-fifths of the difference between the usage rates of manual and passive belts in Rabbits and Chevettes (Pet. App. 102a). Indeed, common sense alone would have suggested that the higher usage rates of detachable belts equipped with an interlock would be principally attributable to the fact that the car could not even be started without reconnecting the belt, and that passive belts that were not detachable would be used far more often than those that were. These critical differences between the optional belts studied and those that would have been installed to comply with the passive restraint requirement of Standard 208 thus formed a sufficient basis for NHTSA's determination not to view the Rabbit and Chevette studies as compelling it to permit that requirement to go into effect.[13]

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[13] NHTSA offered several other sound reasons for distinguishing Rabbit and Chevette studies: (i) the Rabbits and Chevettes were

NAII makes no attempt to show that NHTSA's principal explanation for the higher usage rates in the specially equipped Rabbits and Chevettes was wrong. For its part, State Farm expressly acknowledges (Br. 39) that NHTSA's explanation that these higher usage rates were due to the interlock or non-detachability features "may well be true," if the reason that people do not buckle their manual belts is because they object to the belts. But, citing several attitude surveys, State Farm contends (Br. 39-40) that the reason occupants do not wear manual

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not typical of the Nation's automobile fleet, because a combination of owner demographics and driver risk perception ordinarily leads to higher usage rates in small cars; and (ii) the owners of the Rabbits and Chevettes had not been required to purchase a car with the passive belt systems, as purchasers of cars under Standard 208 would be, because the equipment in the Rabbits and Chevettes was optional; this element of voluntarism suggests that the owners might have been predisposed to accept and use the systems (Pet. App. 97a-98a).

Respondents, quoting a study prepared by a NHTSA contractor, contend that NHTSA was wrong in relying on the factor of owner demographics because " '[s]eat belt use is *not* a behavior which is sharply differentiated by traditional demographic and geographic characteristics of the population' " (State Farm Br. 40, quoting F. Newport & V. Tarrance, *National Safety Belt Study* 22 (Sept. 4, 1981) (C.A. App. 1117 (brackets and emphasis added by State Farm)); see also NAII Br. 21 n.25). Respondents fail to note, however, that the same study stressed that there nevertheless "are *some* differences among demographic subgroups" (*ibid.*; emphasis in original). For example, the use of belts by college graduates was found to be 11 percentage points higher than that of the general population, and white collar workers tended to use their belts more often than blue collar workers. The study also confirmed that usage rates are higher in subcompact cars (See C.A. App. 1118)—which include Rabbits and Chevettes.

Respondents take issue (State Farm Br. 41; NAII Br. 21 n.25) with the voluntarism point made by NHTSA by noting that only 5% of the Chevette owners and 12% of the Rabbit owners specifically requested passive belts (see C.A. App. 90). However, a substantial majority of the purchasers—63% in the case of Rabbits and 75% in the case of Chevettes (C.A. App. 1020)—knew that they were buying cars with automatic belts. It was not irrational to conclude that this factor might have played at least some role in belt use in those cars. Respondents' quarrel with NHTSA's reliance on these additional points therefore is without merit.

belts is that such belts take too much time to buckle or that occupants are lazy or forgetful. These factors, State Farm argues, might be overcome by installation of automatic belts, even detachable ones. In a similar vein, NAII argues (Br. 19-21) that the attitude surveys show that although initial resistance to automatic belts might be high, over time occupants might come to accept them.

The attitude surveys respondents cite in fact present a very mixed picture, and in any event, they scarcely compelled NHTSA to retain the passive restraint requirement in Standard 208. For example, State Farm cites (Br. 40) only one portion of a study showing that, in response to a general question asking why people do not wear seat belts, many people volunteered that buckling up takes too much time or that occupants are forgetful (see C.A. App. 1108). However, when the persons surveyed were asked to rank certain specific reasons suggested by the questioner, the fear of being trapped was regarded as a very important factor by more respondents than were the reasons State Farm mentions (*id.* at 1109; see also *id.* at 1151; page 20, *infra*). The fear of being trapped could actually be heightened, not reduced, by installation of passive belts in all vehicles (cf. Pet. App. 110a), which could in turn lead to the widespread detachment of the belts, as NHTSA feared. Moreover, to the extent that occupants are not in the habit of wearing their seat belts, such a habit would not necessarily be fostered through installation of passive belts that could be instantly and permanently detached before the occupants had become used to the systems and, over time, had developed the habit of wearing them.

Other factors that inhibited the wearing of belts likewise might not be significantly overcome by installation of detachable passive belts. Of particular importance is the factor of comfort. See 44 Fed. Reg. 77210, 77211 (1979); C.A. App. 1108. If the detachable passive belts that would be installed under Standard 208 proved uncomfortable, they would probably be detached.[14] It is

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[14] In this connection, respondents cite (NAII Br. 19-20; State Farm Br. 40 n.40) a 1978 survey in which 68% of the respondents

significant to note in this regard that the use of seat belts in the model year 1974 and 1975 cars equipped with mandatory ignition interlocks declined significantly from approximately 75% when the interlock requirement was in effect (44 Fed. Reg. 77211 (1979)), to a rate that was essentially the same as that for all other vehicles by 1978 and 1979 (see C.A. App. 75). Similarly, the use of the detachable passive belts in the Volkswagen Rabbits that were equipped with an interlock system between 1975 and 1979 declined significantly as the cars grew older (*id.* at 77). This experience casts substantial doubt on NAII's assertion that seat belt usage would increase significantly over time as occupants got used to passive belts.

4. Respondents' argument (State Farm Br. 19-38; NAII Br. 38-40) that NHTSA's rescission of the particular version of a passive restraint requirement contained in Standard 208 was arbitrary and capricious because NHTSA did not first sufficiently consider imposing some other version of a passive restraint requirement—one barring compliance by means of detachable belts—has been answered in our opening brief (Gov't Br. 35-40) and the opening brief and reply brief of petitioners Motor Vehicle Manufacturers Association, *et al.* (MVMA Br. 37-45; MVMA Reply Br. 9-19). The complete answer to this contention is that the court of appeals was not em-

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asked to explain why people do not wear seat belts gave an answer that was placed in the category "Bothersome, inconvenient, forgot" (C.A. App. 81). Contrary to NAII's contention, however, this category need not be read to encompass only reactions at the time of entering the car. A passive belt that closed automatically around the occupant could be regarded as "bothersome" or "inconvenient" as the occupant traveled in the car. Moreover, in the succeeding two years when the same question was asked, the percentages of responses placed in this category were 13.9 and 27.3, respectively. Clearly, the 68% figure for 1978 either was an aberration or certain responses embraced by the category in 1978 were placed in other categories in the succeeding years. It appears that the latter possibility was at least part of the explanation. See R. Berger & G. Persinger, Automated Services, Inc., *1980 Survey of Public Perceptions on Highway Safety* at A-5 (Sept. 1980) (prepared for U.S. Dep't of Transportation, NHTSA, Contract No. DOT HS-9-02230).

powered to direct NHTSA to consider these alternative approaches to the occupant restraint problem in any particular order or proceeding (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978)). Because NHTSA thus was not obligated to consider the alternative respondents urge in connection with its decision to rescind the version of the standard that was of doubtful effectiveness, that rescission would not be rendered arbitrary and capricious even if the court were correct that NHTSA had inadequately considered the non-detachable belt alternative. In any event, the reasons given by NHTSA in its decision were more than adequate to explain why the alternative respondents urge was not so obviously meritorious that it should be adopted at that particular time, without the full opportunity for comment on the issue that would be available in a fresh rulemaking proceeding. We offer the following additional points only by way of emphasis:

a. Respondents plainly err in characterizing (NAII Br. 38; State Farm Br. 28) the provision in Standard 208 permitting detachable belts as a "loophole" that could have been closed by a technical amendment of the Standard. In 1974, NHTSA required seat belts to be detachable for the significant safety reason of ensuring a means of emergency exit (39 Fed. Reg. 14593), and NHTSA has continued to permit detachable belts since 1978, when the spool-out alternative also was permitted (43 Fed. Reg. 52493 (1978)). See Gov't Br. 6 n.8; MVMA Br. 43-44. NHTSA determined, moreover, that detachable belts would in fact be installed in the overwhelming majority of new cars under Standard 208. The alternative respondents contend should have been adopted therefore would have constituted a significant departure from prior practice, which might well have necessitated extended proceedings in order to allow for sufficient comment by the industry that would have to alter its plans so drastically. Surely, it was not necessary to retain what respondents acknowledge to be an unsatisfactory passive restraint requirement until that inquiry was complete.

b. State Farm plainly errs in arguing (Br. 20-23) that there was extensive prior experience with non-detachable belts in Rabbits and Chevettes that could have been utilized in amending Standard 208 to bar detachable belts and that therefore made elimination of the detachability feature obvious. Contrary to State Farm's contention, however, the vast majority of those vehicles—more than 300,000 Rabbits and approximately 20,000 Chevettes—in fact were equipped with detachable belts. What distinguishes those belts from the belts that would have been installed to comply with the passive restraint requirement of Standard 208 is that they were accompanied by ignition interlocks that NHTSA is expressly barred by statute from requiring or even permitting as a means of compliance with a passive restraint requirement. 15 U.S.C. 1410b(b)(1); see Gov't Br. 6 n.7. The remaining 13,000 vehicles that had been studied were 1980 Chevettes equipped with spool-release rather than fully detachable belts, without an ignition interlock, and those cars had met with only limited consumer acceptance despite promotional efforts by General Motors. See Gov't Br. 6 n.7. Respondents therefore are urging that NHTSA should have hastily adopted a requirement that never has been tested on a broad scale.

c. State Farm faults (Br. 34) NHTSA for its explanation that it would not require non-detachable belts that could be released by a spool mechanism because of a "widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash" (Pet. App. 110a). State Farm cites a survey reporting that this reason was given by only 7% of the persons asked to explain why people do not wear seat belts (see C.A. App. 1108). But when fear of entrapment was specifically suggested to those responding to the survey, that fear was rated as a "very important" factor by 48% of the respondents, the highest total for *any* response (C.A. App. 1109, 1151). It would have been inappropriate for NHTSA to ignore this concern.

CONCLUSION

For the foregoing reasons and the additional reasons given in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

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Nos. 82-354, 82-355, 82-388

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,

Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE AMERICAN COLLEGE OF PREVENTIVE MEDICINE AMERICAN ACADEMY OF PEDIATRICS AMERICAN COLLEGE OF EMERGENCY PHYSICIANS AMERICAN PUBLIC HEALTH ASSOCIATION ASSOCIATION OF TEACHERS OF PREVENTIVE MEDICINE NATIONAL ASSOCIATION OF REHABILITATION FACILITIES REHABILITATION INSTITUTE OF CHICAGO AMERICAN TRAUMA SOCIETY NATIONAL SPINAL CORD INJURY ASSOCIATION

DENNIS J. BARBOUR
1015 - 15th Street, N.W.
Suite 408
Washington, D.C. 20005
(202) 789-2927
Counsel for Amici

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether recission of the passive restraint provisions of Federal Motor Vehicle Safety Standard 208 by the National Highway Traffic Safety Administration was arbitrary and capricious.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-354, 82-355, 82-398

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE
AMERICAN COLLEGE OF PREVENTIVE MEDICINE
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AMERICAN PUBLIC HEALTH ASSOCIATION
ASSOCIATION OF TEACHERS OF PREVENTIVE MEDICINE
NATIONAL ASSOCIATION OF REHABILITATION FACILITIES
REHABILITATION INSTITUTE OF CHICAGO
AMERICAN TRAUMA SOCIETY
NATIONAL SPINAL CORD INJURY ASSOCIATION

INTERESTS OF AMICI CURIAE

Amici Curiae collectively represent those within our society who experience first hand the consequences of governmental action in the area of motor vehicle safety. As physicians, health care providers, and accident victims,

they represent those who will be ultimately and perhaps most greatly affected by the judgment of this Court. All are united in their strong support for the passive restraint provisions of Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"), and equally strong in their opposition to the government's rescission thereof, for the reasons stated below.

The American College of Preventive Medicine (ACPM) is a national medical specialty society composed of over 2,000 individual physician members. One of the objectives of the organization is to "foster education and protection of the public regarding health promotion and disease prevention." The College has consistently and publically stated its position of support for FMVSS 208 and the passive restraint provisions thereof.

The American Academy of Pediatrics (AAP) is comprised of more than 24,000 pediatricians throughout the United States and Latin America. Founded over 50 years ago, the AAP works to promote the physical, mental, and social health of infants, children, and young people. To that end, the AAP has been especially instrumental in promoting vehicle and traffic safety to reduce the deaths and injuries of young people caused by automobile accidents. In particular, the Academy has developed a nationwide network of pediatricians whose mission it is to institute public education and legislative campaigns in order to abate unnecessary automobile death and injury to children. Furthermore, the Academy disseminates more than 19,000 pieces of educational and promotional materials on child passenger safety each month. Pediatricians and AAP staff work to educate other physicians, maternal and child health educators, pediatric nurses, parents, and other concerned people about the need to protect infants and children in automobiles.

The American College of Emergency Physicians (ACEP) is a professional association of 11,200 physi-

cians who practice emergency medicine. The College has a particular interest in motor vehicle accident prevention since its members are usually the first physicians to have contact with the victims of automobile accidents. In 1977 the Board of Directors of the College adopted a policy statement endorsing the passive restraint provisions of FMVSS 208.

The American Public Health Association (APHA) is a non-profit professional society with a combined national and affiliate membership of over 50,000 health professionals throughout the United States. Founded in 1872, the APHA works to promote personal and environmental health by setting standards for alleviating health problems, launching public campaigns about specific health dangers, and publishing numerous materials reflecting the latest findings and developments in public health. For decades, the APHA has maintained an active interest and involvement in the issue of automobile safety.

The Association of Teachers of Preventive Medicine (ATPM) is an academic society composed of medical school departments of preventive and community medicine as well as individual medical school faculty who teach preventive and community medicine. As such, members of the Association are in the forefront of medical education as it relates to community-wide efforts to prevent disease, injury, and death. As the leading cause of death for a significant portion of the population, automobile accidents, their causes and sequelae are of utmost concern to the Association's membership.

The National Association of Rehabilitation Facilities (NARF) is the principal national membership organization representing institutions providing both medical and vocational rehabilitation services. Among its membership are 40 freestanding rehabilitation hospitals and approximately 80 rehabilitation units within general hospitals. One of these, the Casa Colina Hospital for Rehabilitative Medicine ("Casa Colina, Inc."), in Pamona, California,

has recently conducted a study, "Rehabilitation of Motor Vehicle Accident Victims—One Hospital's Experience", which indicates that rehabilitation costs for automobile accident victims may be of greater significance than previously thought. Casa Colina serves the California counties of Los Angeles, San Bernardino, Riverside and Orange. Such freestanding hospitals and units provide comprehensive rehabilitation care designed to restore injured and disabled people to their maximum achievable levels of function. A large number of the patients are victims of trauma. Of these, a substantial portion have experienced injuries in automobile accidents. As a result of treating people with such injuries, NARF members have firsthand experience with serious injuries caused by automobile accidents and their high cost to society.

The Rehabilitation Institute of Chicago and Northwestern Memorial Hospital comprise the Midwest Regional Spinal Cord Injury Care System, the largest of the 17 Spinal Cord Centers in the United States. In the years 1973-1981 there were 4,340 people admitted to the 17 Spinal Cord Systems. Forty-six percent (46%) of those people were injured in motor vehicle accidents.

The American Trauma Society (ATS) is an organization of physicians, health care professionals, parents, and teachers dedicated to insuring the availability and effectiveness of emergency medical systems throughout the United States. Such systems are concerned with the prevention as well as the treatment of traumatic injury, including automobile and industrial accidents and other traumatic injuries, which together kill 100,000 individuals each year, 28,000 of which are front seat passenger car occupants.

The National Spinal Cord Injury Association (NSCIA) is a voluntary health agency which is dedicated to a comprehensive approach to the problem of spinal cord injury, including programs aimed at the prevention of spinal cord injury, services to spinal cord injured per-

sons and their families, and research toward an eventual cure for the paralysis resulting from spinal cord injury. Because the Association views passive restraints as a successful method of preventing spinal cord injuries in automobile accidents, which are currently the leading cause of such injuries, the Association is particularly interested in bringing about the full utilization of such restraints.

In accordance with Supreme Court rule 36.2, Amici have obtained and filed with the Court the written consent of the parties to submit this brief amicus curiae.

SUPPLEMENTAL STATEMENT OF THE CASE

Amici adopt and incorporate by reference the statement of the case contained in the brief filed by respondents State Farm Mutual Automobile Insurance Co. et al. The following additional information, however, is of particular concern to Amici.

Magnitude of the Problem

According to the latest available data, motor vehicle accidents are the fifth leading cause of death in this country, and are the leading cause of death for persons 1-34 years of age. In 1978, 51,500 persons died in motor vehicle accidents, of which approximately 28,000 were front seat occupants. An additional two million persons suffered disabling injuries in 1978 as a result of motor vehicle accidents.

This translates to the following morbid statistics: every 10 minutes someone dies in a traffic accident; injuries, many of which are the major cause of paraplegia, epilepsy, and cerebral palsy, are sustained at the rate of one every 8 seconds; the number of persons killed each day, 140, is the equivalent of a major airline crash. During their lifetime, individuals have a 1 in 100 chance of dying in an automobile accident, and a 1 in 3 chance of suffering a disabling injury as the result of an automobile accident.

The economic costs of motor vehicle accidents are equally staggering, from $24.3 billion to $29.3 billion per year in 1981 dollars for all injuries and fatalities and from $15.8 billion to $18.9 billion per year in 1981 dollars for accidents involving front seat occupants.[1]

Were these deaths and disabling injuries caused by an infectious agent, their occurrence would be considered an epidemic. However, death and disability from automobile accidents are not caused by a mysterious infectious agent but are in fact caused by man-made technology. Like other epidemics such as tuberculosis, typhoid fever, diptheria, and polio, death and disability from automobile accidents can be enormously reduced through the application of other available, man-made technology. Delay in imposition of that technology has already meant the needless loss of over 130,000 lives over the past decade, lives that would have been spared had we employed the technology we had at our disposal. Other lives have been detrimentally affected, representing tremendous loss to society as well as to the individuals involved.

Spinal Cord Injury

The two major disabilities resulting from motor vehicle accidents are cerebral trauma and spinal cord injury. Injury to the head or spinal cord often results in death or irreversible motor and sensory deficits. The medical problems of persons who survive such an injury are monumental, and the impact on our society of the costs and uses of medical resources for these problems is enormous.[2] The national mean cost for one person's in-

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[1] See *Comments of William Nordhaus on Notice of Proposed Rulemaking on Federal Motor Vehicle Safety Standards Occupant Crash Protection*, NHTSA Docket No. 74-14, Notice 22, May 26, 1981, Table A-2.

[2] Jess F. Kraus, "Injury to the Head and Spinal Cord: The Epidemiological Relevance of the Medical Literature Published from 1960 to 1978," *The National Head and Spinal Cord Injury Survey*, National Institute of Neurological and Communicative Disorders and Stroke, November, 1980.

jury, acute and rehabilitation care on a first time basis is $54,269. This figure reflects all those within the system with a spinal cord injury, not just those most severely disabled.

A generally typical case history is the following: Carol Smith (the patient's name has been changed because of pending litigation), a 28 year old female, was being driven home by her boyfriend at approximately 11:30 p.m. January 1, 1979. The roads were slick; the car was going only 15 miles per hour when it hit a patch of ice and swerved into a viaduct. Neither the driver nor the passenger was restrained. Carol was thrown forward causing her spinal cord to be severed at the cervical—5 vertebrae, rendering her quadriplegic.

Prior to her accident Carol was a research associate in hematology at Rush-Presbyterian Medical Center in Chicago. She had just returned from Alaska where she had traveled and worked for six months. Her injury has forced her to revise her career plans and has necessitated her return to graduate school and a switch in major from biology to psychology. "There is no place for a BA in biology who can't use her hands," she states.

Since the Department of Vocational Rehabilitation will not pay for graduate studies, Carol must incur those costs herself along with the $8,000 necessary for a van with a specially designed lift system.

Although previously stated that the mean cost for first time acute and rehabilitative care is $54,269, because of the nature and severity of her injuries, Carol's costs for one month in the Acute Spinal Cord Department of Northwestern Memorial Hospital and five months in the Rehabilitation Institute of Chicago totalled $73,379.99. Attendant care at home presently costs $750.00 per month. Her medication and supplies are currently paid by the state, and although she does not know the exact cost of these, she says that they are continually rising.

Recently Carol's attendant quit unexpectedly, putting her life once again into utter chaos. She articulately states the despair she feels over the loss of control she experiences and the anger at the dependency on other people, and on state and federal agencies. Because of her disability, both her range of choices and her ability to make choices, as that of her family, have become extremely limited. Those problems do not have a price tag.

Cerebral Trauma

Motor vehicle accidents are the prime cause of head injury, accounting for 51% of all nationally reported cerebral trauma and 61% of the cerebral trauma patients seen at the Rehabilitation Institute of Chicago. For brain injury the annual direct care plus indirect costs (e.g., foregone or reduced earnings, etc.), were estimated to be $3.9 billion in 1980 dollars,[3] thereby making motor vehicle related cerebral trauma figures approximately $2 billion per year.

An example of such a head trauma case is David Canner, a 28 year old, married male with a 19 month old son. On January 31, 1982 at 5:30 p.m., as he was driving home from work, his car hit an icy patch on a very familiar stretch of highway that accesses the Indiana Tollway. Canner, who was not wearing a safety belt, lost control, skidded into a pole, went into a ditch and was thrown into the back seat of the car, suffering massive brain injuries.

He spent four months in a coma in Gary Methodist Hospital in Indiana and then was transferred to Northwestern Memorial Hospital for one month where his acute care continued. He was then sent to the Rehabilitation Institute of Chicago for seven months of rehabili-

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[3] Dallas W. Anderson, William D. Kalsbee, and Tyler D. Hartwell, "The National Head and Spinal Cord Injury Survey: Major Findings," *The National Head and Spinal Cord Injury Survey*, National Institute of Neurological and Communicative Disorders and Stroke, November, 1980.

tation. His wife estimates his bill for that period of time to exceed $400,000.

As an insurance adjuster for Farm Bureau Insurance Company, he was well protected financially for this catastrophe, but he is not covered for the costs of hiring a fulltime practical nurse, or parttime physical therapist, and a visiting nurse.

The accident that has left him paralyzed on the right side of his body, confined to a wheelchair, and unable to resume his previous role in the family has devasted his parents and his wife. Although he is significantly improved since returning home six weeks ago, their lives will never be the same. Once active and assertive, the goals for David Canner are limited now to being able to be left alone for short periods of time, to be able to dress himself and perhaps to find employment in a sheltered workshop. David's wife, Kathy, reflects that these "accidents" always happen to someone else, not to someone you love, not to your own family.

Injury to Children

Motor vehicle accidents are the leading cause of death and injury to children. More than 150,000 children 0-14 years old sustain disabling injuries in motor vehicle accidents each year in the United States.[4] In 1971-1972, the latest year for which figures are available, there were approximately 79,000 days of restricted activity due to motor vehicle-related injury in children less than 17 years of age, and there were also more than 15,000 days lost from school.[5]

Of the 1,500 children killed under the age of four in 1978, some 800 were motor vehicle occupants. In com-

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[4] National Safety Council: Accident Facts. 1979 Edition. Chicago, 1979

[5] Wilder D: Persons injured and disability days detailed by type and class of accident. United States, 1971 and 1972. U.S. DHEW, Health Resources Administration, National Center for Health Statistics, 1976

parison, in the same year, less than 640 children under 4 years of age died of cancer.[6] In 1978, more than 50,000 motor vehicle occupants under five years of age sustained injuries requiring an emergency room visit.[7]

Recent data indicate that proportionally more infants are killed in motor vehicle accidents than older children. Despite the fact that children under one year travel less than 1 to 5 year olds,[8] their death rate is higher. Children less than six months of age have an occupant death rate of 9.1 per 100,000 population compared with a rate of about 3 per 100,000 population for three year olds.[9]

If a collision occurs, and the child is properly restrained, he or she can usually be decelerated at a rate that is tolerable to the body and injuries do not occur or are minimal. If unrestrained, the consequences are horrifying. Upon impact, the child becomes an unguided missile that is launched on a course which may lead to injury or death. Thirty-five per cent of unrestrained children are ejected from motor vehicles, often to land head first on the street.[10] Other children frequently come into contact with other occupants of the car and this may injure the other person as well as the child.[11] Many come into contact with various components of the interior

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[6] Ibid., National Safety Council

[7] Baker SP: Deaths and injuries to children as motor vehicle occupants. Presented at the National Conference on Child Passenger Protection. Washington, DC, Dec. 10-12, 1979

[8] Ibid.

[9] Baker SP, Karwacki JJ: Children killed in crashes. Proceedings of the Twenty-Third Conference of the American Association for Automotive Medicine, 1979, pp 335

[10] Sherz RG: Fatal motor vehicle accidents of child passengers from birth through four years in Washington state. Presented at the National Conference on Child Passenger Protection. Washington, DC, Dec. 10-12, 1979

[11] Williams AF: Warning: in cars, parents may be hazardous to their children's health. Washington, DC, Insurance Institute for Highway Safety, 1978

of the motor vehicle which are not designed to cushion the impact as gently as possible; injury, often severe or lethal, is the result.

If the child is on the lap of another passenger and both are unrestrained, they continue in a crash to move in the original direction of travel until they strike something. Under these circumstances, the child may be crushed between the interior of the car and the adult body. If the child is on the lap of a restrained individual, the restrained person remains seated, but the child goes flying. In experimental situations, adults lose their grip on a child-size dummy even in instances of relatively common deceleration. To illustrate, in a crash at about 30 miles per hour, a 15-20 pound 6-month old child exerts a force equivalent to an apparent weight of some 600 pounds.

This carnage and waste contrasts dramatically with the man-made technology we have at our disposal to prevent it.

For over a decade the American automobile industry has had at its disposal proven and effective means of automobile occupant restraints which are the subject of this case. As discussed in detail in respondent's brief, both air bags and nondetachable belts have been subjected to billions of miles of real world experience, in which they have been proven to be effective means of death and injury prevention. Over the past decade, hundreds of thousands of lives have already been irrevocably damaged or lost by delay in imposition of a commonsense solution to a major public health problem. Extrapolation to the future of the data on death and injury over the past decade provides a sobering picture of the potential consequences of the outcome of the Court's decision in this matter.

It is for these and other reasons that Professor Nordhaus has labeled the passive restraint provisions of FMVSS 208, "from an economic point of view, as im-

portant as any environmental, health or safety rule now on the books".[12] From a human point of view, this may be one of the most important cases to come before this Court, affecting as it does so many lives.

In 1963, at the height of the polio epidemic, 3,000 Americans died. America rushed to develop a vaccine. Today, more than 3,000 people die of automobile related injuries in less than one month. Acceptance of this appalling statistic in light of the measures we have at our disposal to substantially prevent it is analogous to admonishing people to stay out of crowded theaters and swimming pools while withdrawing polio vaccine from use.[13]

SUMMARY OF ARGUMENT

Although the National Highway Traffic Safety Administration's (NHTSA) decision to rescind the passive restraint provisions of FMVSS 208 is not sustainable under the deferential Administrative Procedure Act standard and scope of review, rescission of protective regulations involving significant health and safety issues should be subject to close judicial scrutiny to ensure that rescission is not contrary to Congressional mandate.

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[12] Comment of William O. Nordaus, John Musser Professor of Economics at Yale University, May 26, 1981, R. 511, 514.

[13] Rescission of the passive restraint provisions would not even guarantee individuals the right to exercise their freedom of choice to have passive restraints. Notwithstanding the assertion of Petitioners Consumer Alert and Pacific Legal Foundation that "those who favored it (the passive restraint provision) can still purchase cars equipped with passive belts," Petitioners' brief at 5, passive restraints are not widely available as an option on automobiles sold in the United States. Volkswagen and Toyota do offer passive restraints as an option on their "top of the line" models and Mercedes Benz has recently announced that it will offer a passive restraint system that does not meet the 208 standard; otherwise passive restraint systems are not available as options. Amici would further note that it is preposterous to suggest that innocent children are able to exercise their "consumer choice" in this matter.

ARGUMENT

I. Although, as respondents correctly argue, the Court of Appeals has neither applied an inappropriate standard nor broken new ground in enunciating a new scope of review in this case, in rescinding a regulation, particularly *where that regulation involves significant public health and safety issues*, an agency should be required to make a showing that *public health and safety* is *better* served by rescission than by retention.

A. *"Arbitrary and Capricious" Test*

As respondents State Farm Mutual Automobile Insurance Co. correctly argue, the standard for review in this case is the "arbitrary and capricious" test embodied in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402,414 (1971) *citing* 5 U.S.C. Section 706(2)(A). The scope of review embodied in *Overton Park*, as applied by the Court of Appeals, is also appropriate in this case.

As respondents point out, a long line of judicial opinions require that "an agency changing course must supply a reasoned analysis" of the factors justifying a change. *Greater Boston Television Corp.* v. *F.C.C.*, 444 F.2d 841, 852 (D.C.Cir. 1970) (Leventhal, J.) (emphasis added), *cert. denied*, 403 U.S. 923 (1971). Furthermore, as the Court pointed out in *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-8 (1973), a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. *There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.*" (emphasis added)

Furthermore, where an agency rescinds regulation which was at one time presumed to be in furtherance of an agency's mandate, it should make a showing that past rationale for the regulation is not being "casually ignored." *Greater Boston Television Corp.* v. *FCC.* 444

F.2d 841,852 (D.C.Circuit 1970) (Leventhal J.), 403 U.S. 923 (1971).

Amici concur with the analysis of respondents *State Farm*, et al. regarding the application of the reasoned analysis test to this case and agree that such was lacking in NHTSA's final decisionmaking to rescind the passive restraint provisions. However, Amici further argue that where substantial issues of public health and safety are entrusted to an agency, rescission of a safety regulation should be based upon a strong showing that safety is being promoted and not undermined by rescission.

B. *Safety is the "Overriding Consideration" in Issuing Motor Vehicle Safety Standards*

The overriding purpose of the National Traffic and Motor Vehicle Safety Act of 1966 was to "reduce traffic accidents and related costs and deaths and injuries resulting from traffic accidents." 15 U.S.C. Section 1391. The Act directed that the Secretary of Transportation "shall" issue motor vehicle safety standards. 15 U.S.C. Section 1392(9). The issue of safety was addressed in the Senate report accompanying S.3005, wherein the report stated:

> "The Committee intends that safety shall be the overriding consideration in the issuance of standards under this bill." (Senate Report #1301, 89th Congress, 2nd Session at 6 (1966)). *See also* HR Rep. 1776, 89th Congress, 2nd Session at 16 (1966).

It was in response to this mandate that the issue of passive restraints was first raised by NHTSA in 1969. The history of the passive restraint provision is reviewed in depth in respondents' brief and will not be repeated here, except to point out that over a 12 year period the passive restraint provision has been acknowledged by successive Secretaries of Transportation and Administrators of NHTSA, up to and including the current Administrator, to be a means of saving lives. Clearly, prior to the

October 1981 rescission of the passive restraint provisions, definitive movement toward implementation of the provisions was a "settled course of behavior" as the best means of preventing death and injury attributable to the "second collision." Presumably, unsuccessful Court challenges to the rule during this period made it clear that NHTSA was acting in fulfillment of its safety mandate by proceeding with the regulation. The question then is whether NHTSA has shown that rescission is now the more effective means of fulfilling its safety mandate.

In light of the fact that the National Traffic and Motor Vehicle Safety Act of 1966 is a "technology forcing" statute, it was clearly Congress' intent that NHTSA, where appropriate, take positive action to *most effectively* promote motor vehicle safety. For over a decade the presumption has been that traffic safety would be most effectively promoted by implementation of the passive restraint provision. NHTSA's sudden change in its course of behavior, beyond being non-arbitrary, should therefore be based upon a strong showing that rescission of the passive restraint provisions advances public health and safety to a greater degree than does retention of these provisions. Otherwise NHTSA is at risk of acting contrary to its mandate by *jeopardizing*, rather than *advancing*, safety.

Viewed from this perspective, NHTSA's emphasis of factors other than safety, or those on which it ultimately appears to base its decision, is clearly given disproportionate weight in its decisionmaking. On the other hand, support for the proposition that rescission advances safety to a greater degree than does retention is virtually nonexistent in the record.

With the backdrop of a planned "education campaign" to increase usage of manual belts, NHTSA engages in conjectural reasoning regarding consumer acceptance of passive belts, the resentment such technology might provoke, and its impact on the government's credibility.

Within the context of its mandate, its analysis is misplaced and given inappropriate weight. *Safety* is to be NHTSA's overriding consideration. Although public acceptance is clearly a "factor" to be considered,[14] NHTSA appears to have been immobilized by a factor which is clearly in the realm of public policy, correctly the domain of Congress. As demonstrated by its intervention to forbid regulation involving the ignition interlock, Congress is capable of expressing the public will; it is not the role of NHTSA to either second-guess the public will nor to cower from its mandate for fear of Congressional intervention.

NHTSA's appropriate role here is to "exercise the discretion with which Congress has empowered it." *Burlington Truck Lines, Inc.* v. *U.S.* 371 U.S. 156, 168 (1962) and *promote* safety by at least "forcing" industry to utilize superior existing technology if it finds the detachable belt to be of minimal additional merit, rather than *jeopardizing* safety by capitulating to the plans of industry to implement the standard by means of a clearly inferior technology. Clearly Congress intended NHTSA to be the guardian of traffic safety by, among other things, taking regulatory action where appropriate to insure that the private sector is employing the best available technology in the pursuit of traffic safety.

Within the context of the social contract, it is every citizen's reasonably implicit assumption that its government is at all times representing the best interests of the public. A government's credibility depends upon the extent to which this is perceived to be the case by its citizens. Where, as here, an agency fails to show how

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[14] As the Court in *Pacific Legal Foundation* v. *DOT*, 593 F.2nd 1338 (D.C. Circuit) *cert. denied*, 444 U.S. 830 (1979), pointed out, public acceptance of passive restraints is a factor to be considered here. However, the Court did not imply that public acceptability should be a major factor, nor that safety standards be subject to "popularity contests."

it is exercising the discretion Congress has entrusted to it to promote the public's safety, that very credibility is undermined. In the view of Amici, therefore, rescission of the passive restraint provision is far more threatening to governmental credibility than is some amorphous concept of consumer acceptance.

If NHTSA is unable to show that rescission is in greater furtherance of safety than is retention, it is therefore unable to show that a change in its "settled course of behavior" is not contrary to its mandate. As petitioners point out, NHTSA's decision to rescind, even standing alone, is not "supported by evidence." *ICC* v. *Union Pacific R.R.*, 222 U.S. at 547-48. If juxtaposed against the additional safety that will result from rescission, the decision to abandon the passive restraint provision is clearly without support in the record.

II. NHTSA's decision to rescind the passive restraint provisions of FMVSS 208 at the eleventh hour was a sudden reversal and a decision not to proceed to regulate as mandated by Congress. As such it is distinguishable from its earlier decision to change course and set an implementation date for the standard.

Health and safety regulation as proposed and mandated by an agency whose mission it is to issue such cannot be viewed in a vacuum. An agency's decision to go forward with regulating or not must be viewed in the context of its mandate. As the Court stated in *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2nd 608, 620 (2nd Cir. 1965) *cert. denied* 384 U.S. 941 (1966) regulatory agencies do not function "as an umpire blandly calling balls and strikes for adversaries appearing before them." In the area of motor vehicle safety standards it was clearly Congress' intent that NHTSA move forcefully to insure motor vehicle safety. It is in this light that Petitioners' Pacific Legal Foundation and Consumer Alert repeated reference and analogy to

NHTSA's "change in course" in 1977 must be viewed. In July of that year Secretary Adams decided to dispense with previous Secretary Coleman's demonstration project and instead set an implementation date for the passive restraint provisions. On petitions for review, the United States Court of Appeals for the District of Columbia sustained the modified standard and the decision to implement it as a matter of judgment *which was otherwise supported by the record. Pacific Legal Foundation* v. *DOT* 593 F.2nd 1338 (D.C. Circuit) *cert. denied*, 444 U.S. 830 (1979).

Although its decision to change course and issue the passive restraint provisions was upheld by the Court of Appeals in *Pacific Legal*, NHTSA's action there is distinguishable from its recent decision to abandon the passive restraint provision for, among other reasons, the 1977 decision was one to *proceed* with regulation, which is part of NHTSA's mandate, rather than dispense with regulation. The presumption, especially where the settled "course of behavior" is toward regulation, should be that the agency is best fulfilling its mandate through regulatory means. If clear error is being made in the process of regulating, it will certainly become evident upon judicial review. Where, over time, regulation is accepted as the most effective means of fulfilling Congressional mandate, a reversal in that course of conduct should be more suspect than a continuation of the regulatory scheme.[15]

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[15] Notwithstanding Petitioners' obvious interest in the theoretical debate over the relative merits of regulation versus deregulation, Amici will not be lured into a discussion of such abstract concepts. With tens of thousands of lives lost each year in preventable traffic accidents, we as a society do not have the time to luxuriate in such a debate as it applies to passive restraints. Loss of life is not theoretical; it is painfully real to automobile accident victims and their families.

CONCLUSION

For the reasons stated herein, Amici contend that the decision of the National Highway Traffic Safety Administration was a blatant and unconscionable betrayal of the public trust conveyed to the agency by Congress. As such it was arbitrary and capricious, as the Court of Appeals correctly found. The decision of the Court below should therefore be affirmed.

Respectfully submitted,

DENNIS J. BARBOUR
1015 - 15th Street, N.W.
Suite 403
Washington, D.C. 20005
(202) 789-2927
Counsel for Amici

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Nos. 82-354, 82-355, 82-398

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On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION, *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

NATHAN LEWIN
(Counsel of Record)
ANNE SHERE WALLWORK
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for the American Insurance Association, Amicus Curiae

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INTEREST OF THE *AMICUS*

The American Insurance Association is an unincorporated trade association of 168 publicly-owned property and casualty insurers who write substantial amounts of private passenger and commercial automobile insurance in the United States. In 1981, the Association's members wrote a total of $5.3 billion in

private passenger automobile insurance premiums, accounting for more than fifteen percent of the market for such insurance. The Association has long been committed to promoting highway safety. It has a substantial interest in the implementation of the automatic crash protection requirements of Federal Motor Vehicle Safety Standard 208, and in any clarification or modification of Standard 208, because its members are certain that mandatory installation of passive restraint systems will significantly improve the safety of automobiles driven on the country's highways and will, consequently, affect the insurance market.

Accordingly, the American Insurance Association, as *amicus curiae*, supports the implementation of Safety Standard 208 and believes that the Department of Transportation, through the National Highway Traffic Safety Administration ("NHTSA"), acted unlawfully in rescinding the passive restraint requirement. Consent to file this brief has been obtained from all parties pursuant to Rule 36.2 of the Rules of this Court.

ARGUMENT

Introduction And Summary Of Argument

This *amicus* brief is being submitted not to restate or add to any argument made by the respondents but to present, for the Court's consideration, three discrete and relatively simple propositions:

First, although this case, in its present posture, involves the validity of a final rule issued by an Executive Department in October 1981 with an accompanying statement of reasons, a reviewing court should not blind itself to the history of administrative decision-making on this subject—and particularly to official public explanations made by the Executive Department less than nine months before issuing its final rule. It is patent from the complete record of administrative action that the decision by NHTSA to rescind the passive restraint regulation in October 1981 was influenced in large measure by the

same economic considerations that (1) had induced NHTSA in February 1981 to delay the imposition of the identical passive restraint requirements and (2) had caused it in April 1981 to propose amendments to the Safety Standard imposing those requirements. The primary economic consideration expressly invoked by NHTSA in its earlier rulings—the depressed state of the domestic automobile industry—is a totally impermissible factor for NHTSA to evaluate and utilize under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1976). By the time its final ruling was issued, NHTSA realized that it could not lawfully base its decision to withdraw the automatic safety requirement explicitly on the economic difficulties of the automobile industry. Consequently, the published explanation that accompanies NHTSA's October 1981 decision strikingly omits a justification on which NHTSA depended heavily in its earlier public pronouncements. Such calculated silence at the eleventh hour should not bar a reviewing court from considering the realities proved by earlier official pronouncements.

Second, NHTSA's stated reason for rescinding *in toto* the passive restraint requirement suffers from so obvious a logical flaw that it calls to mind the fairy tale of the Emperor's New Clothes: It must be obvious to a child that just as the Emperor truly had no clothes, NHTSA, notwithstanding its flurry of words, has no rational basis for doing what it has done. NHTSA invoked the 1966 Safety Act through several Administrations to develop a safety standard for a goal that has been uniformly found to be necessary and desirable—a protective system not dependent on action by a vehicle's occupants. In order to provide the greatest latitude to each automobile manufacturer to achieve this objective within its own financial and technological capabilities, NHTSA gave its official blessing to two forms of passive restraint. NHTSA has now found fault with one of the two officially approved options that most automobile manufacturers would have unilaterally chosen, and on this basis NHTSA has discarded the entire Safety Standard—including the unquestioned safety goal and the remaining effective option. No principle of law or rational

regulatory policy permits an agency entrusted with the lives and safety of millions of Americans so arbitrarily to flush away a live and vigorous baby with what it finds to be dirty bathwater. We do not agree with NHTSA's poorly reasoned and unjustified rejection of automatic belts as a passive restraint option. But in any event, it was arbitrary and capricious for NHTSA not to adjust its safety standard to its new findings by simply eliminating the alternative which it now finds inadequate to achieve the desired safety objective, and requiring use of air-bags, a form of passive restraint that NHTSA does not question at all.

Third, we turn to the relief which should be granted here. If this Court agrees that the Safety Standard should have been amended by NHTSA to retain whatever alternative is effective, the court of appeals should be directed to order NHTSA promptly to implement such an amended standard. Judicial decisions have approved the entry of such orders. If, on the other hand, the petitioners' positions are sustained and this Court decides that the court below applied a review standard that exceeded its statutory authority, the question of the validity of NHTSA's rescission of Safety Standard 208 should be returned to the court of appeals for decision in light of the correct standard of review. This Court has had occasion recently to apply this principle in the analogous context where a court of appeals, in reviewing a district court's judgment, concluded that the district court had utilized an erroneous legal standard. The appellate court's proper function is then to remand the case to the district court for it to apply the correct legal standard to the facts. By the same token, if the petitioners prevail, the court of appeals should be directed in this case to evaluate the bulky administrative record by the correct standard of review. It is not this Court's duty to announce that standard and, at the same appellate juncture, to apply itself the correct yardstick to the particular facts.

I

NHTSA'S RESCISSION OF SAFETY STANDARD 208 WAS UNLAWFUL BECAUSE IT RESTED UPON EARLIER OFFICIAL ACTIONS PROMPTED BY THE AGENCY'S IMPERMISSIBLE CONCERN OVER THE DEPRESSED ECONOMIC STATE OF THE DOMESTIC AUTOMOBILE INDUSTRY.

The Safety Act established a regulatory structure under which the Secretary of Transportation or his designee[1] was directed to issue objective motor vehicle safety standards to carry out the Act's purposes. Like other legislation, the Act enumerated those considerations that the Executive Branch officer or his designee—in this case, NHTSA (*see* 49 C.F.R. §§ 1.50(a), 501.2 (1981))—may evaluate. Plainly, NHTSA is not authorized to import into its determinations of safety standards a host of factors that are within the areas and expertise of other federal agencies. It would, for example, be improper for NHTSA to consider federal tax policy in deciding when and how to impose federal auto safety regulations. By the same token, it would be impermissible for NHTSA to determine its safety standards by weighing issues of labor relations, foreign policy, or antitrust law. Consequently, had NHTSA stated on October 23, 1981, that it was rescinding the passive restraint requirement of Safety Standard 208 because of the depressed state of the domestic automobile industry—a subject that should be of no concern to the agency—that action would have been patently unlawful. It would have been an instance of an agency exceeding its authority by rendering a decision based on factors that Congress had not committed to its appraisal.

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[1] When the Safety Act was passed, the Department of Transportation did not exist, and the statutory function was assigned to the Department of Commerce. Shortly thereafter, in October 1966, the Department of Transportation was created by Pub. L. 89-670, 88 Stat. 1533 (1966) (codified at 49 U.S.C. § 1652(a) (1976)), and in 1967 NHTSA's precursor, the National Highway Safety Bureau, was formed. *See* 32 Fed. Reg. 8225 (1967). NHTSA came into existence and assumed responsibility for federal motor vehicle safety standards in 1978. *See* 43 Fed. Reg. 8525 (1978).

NHTSA did not, in fact, explicitly rest its October 23, 1981, ruling on the depressed state of the automobile industry. But several formal steps leading to rescission, which were taken in the same year that rescission was announced, were explicitly based on the economic ills of the domestic automobile industry. After relying upon that impermissible consideration as it moved towards rescission, NHTSA cannot avoid the consequences by merely omitting any mention of this economic factor when the final step is taken.

A. NHTSA Explicitly Cited The Automobile Industry's Economic Difficulties As The Principal Reason For Delaying And Proposing to Amend The Passive Restraint Requirements.

(1) NHTSA proposes delay to help the industry.

On February 12, 1981, less than seven months before implementation of the first phase of compliance with the passive restraint requirements, and barely three weeks after Secretary of Transportation Drew Lewis took office, NHTSA proposed a one-year delay, from September 1, 1982, until September 1, 1983, in the effective date of the automatic restraint requirements for large cars.[2] 46 Fed. Reg. 12033 (1981) (R. 1622).[3] One stated reason for the proposed delay was the

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[2] This came soon after the automobile manufacturers sent President Reagan a long letter asking for a number of Executive Branch concessions to aid the industry. As reported in a February 9, 1981, issue of *Automotive News* (reproduced as Appendix A to this brief), the letter asked the Department of Transportation "to reevaluate the need for the passive-restraint standards" as well as to establish "a reduced bumper standard—from 5 MPH to 2.5 MPH for longitudinal forces and a reduction in corner requirements to 1.5 MPH." The passive restraint requirements were delayed on April 9, 1981, and rescinded on October 23, 1981. The bumper standard was reduced, precisely as requested by the automobile industry, on May 20, 1982. 47 Fed. Reg. 21820.

[3] References to the Joint Appendix filed by the parties in the Court of Appeals are cited as "R. ____." References to the Appendix to the Petition for a Writ of Certiorari filed by the Motor Vehicle Manufacturers Association are cited as "Pet. App. ____."

"changed economic circumstances since the schedule was adopted in 1977." *Id.* Explaining the basis for the proposed delay, NHTSA emphasized the well-known "difficulties of the automobile industry and some of its members."[4]

(2) NHTSA grants delay to maintain sales and profits in the industry.

Two months later, in April 1981, the agency adopted the one-year delay (46 Fed. Reg. 21172 (R. 1272)), despite the fact that all of the professional economists' cost-benefit analyses indicated that the economic costs of the delay greatly exceeded its benefits. *See* R. 511, 606, 714. The "current poor economic condition of the automobile industry" was again a crucial factor underlying the agency's action. 46 Fed. Reg. at 21173 (R. 1273). The final notice announcing the one-year delay declared (46 Fed. Reg. 21174 (R. 1274) (emphasis added)):

> On the basis of the record herein, the Department has concluded that the applicability of FMVSS 208 in MY 1982 to large cars would be impracticable and unreasonable. Requiring such compliance *would reduce sales and profits, and increase unemployment, for the manufacturers of such vehicles.*

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[4] NHTSA stated (46 Fed. Reg. 12033-34 (R. 1622-23)):

> Sales continue at a very depressed level. . . . Losses by even the largest of the domestic manufacturers have been reported. These losses come at a time when the domestic manufacturers must continue to spend unprecedented sums to meet the continuing demand for ever more fuel efficient cars and to meet the challenge of foreign car manufacturers.
>
> . . . [I]mplementation now may shift some demand from large cars to mid-size cars at a time when large car sales are already slumping badly.
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> * * *
>
> [D]elaying the first phase of the current schedule for one year will provide manufacturers with substantial financial and engineering resources to devote toward . . . other important product programs. . . . If the Department should decide to adopt a one year delay for large cars, GM and Ford together could defer up to $37 million in investments, according to industry figures.

NHTSA asserted at the time that the Safety Act authorized it to consider the "general economic health of the automobile industry," not only in deciding whether to delay implementation but also in deciding whether to rescind or retain a safety standard (46 Fed. Reg. 21175 (R. 1275)). This reasoning was explained as follows *(id.)*:

> What is reasonable and practicable for a healthy firm or industry may not be for an ailing one. . . . Vehicle sales remain at depressed levels and unemployment in the domestic industry is extremely high. . . .
>
> The Department concludes . . . that economic hardship to the affected industry and individual companies must be balanced with all other considerations in determining the "reasonableness" and "practicability" of a particular safety standard.

(3) NHTSA proposes rescission because of the industry's "economic difficulties."

When it adopted the one-year delay, NHTSA also proposed, as one of several alternatives, the rescission of the Safety Standard's passive restraint requirements. 46 Fed. Reg. 21205 (1981) (Pet. App. 147a). In so doing, it again emphasized the poor economic condition of the domestic automobile industry. NHTSA said that the "same factors" set forth in the initial notice and final rule for the one-year delay had also led it to propose totally rescinding the automatic restraint requirements. 46 Fed. Reg. 21206-07 (Pet. App. 152a). NHTSA said it was considering rescission partly because of (46 Fed. Reg. 21206 (Pet. App. 151a) (emphasis added)):

> the substantial impact of automatic restraints on manufacturer and consumer costs and *the accentuation of those manufacturer impacts by the economic difficulties of the automobile industry.*

(4) NHTSA's steps are described as "Actions to Help the U.S. Auto Industry."

A telling indication of the primacy given to the economic condition of the automobile industry in NHTSA's April 1981 actions was the title of the public announcement made by the White House Press Office. Both the final order adopting the

one-year delay and the notice proposing possible rescission were included in a package distributed to the press under the title "Actions to Help the U.S. Auto Industry" (R. 1281, 1285, 1318-1321).[5]

B. In The Absence Of An Explicit Repudiation, NHTSA Should Be Presumed To Have Issued Its Final Rule In Accordance With The Primary Considerations It Expressed At Earlier Stages In Its Process.

Having emphasized the difficult straits of the automobile industry at the stages leading up to the final rule issued on October 23, 1981, NHTSA cannot simply omit reference to that important consideration at the most critical point and thereby remove it from the sight of a reviewing court. The agency's published explanation of its final rule rescinding the passive restraint requirement, 46 Fed. Reg. 53418 (1981) (Pet. App. 88a), did not highlight or even cite explicitly the misfortunes of the automobile industry. There were, to be sure, several passing references in the final rule and accompanying Regulatory Impact Analysis ("RIA") to the possibility of reduced automobile sales.[6] These were ambiguous enough that they could

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[5] Also announced as part of the "Actions to Help the U.S. Auto Industry" was a proposed amendment of the uniform tire quality grading standards (R. 1322). On February 2, 1983, NHTSA suspended the tire grading system. *See New York Times*, February 3, 1983, p. A1 (reproduced as Appendix B to this brief).

[6] *See, e.g.*, 46 Fed. Reg. at 53423 (Pet. App. 105a), where NHTSA explained that automatic restraint requirements were not "reasonable" and "practicable" partly because

> while the car manufacturers might be able to pass along some or all of their costs [of complying with the safety standard] to consumers, the necessary price increases would *reduce sales*. . . . [T]hose sales losses would cause net employment losses. *Additional sales losses might occur due to consumer uncertainty about or antipathy toward the detachable automatic belts* . . . .

See also 46 Fed. Reg. 53426 (Pet. App. 117a), where NHTSA said that rescinding the automatic restraint requirement would enable "the car manufacturers to reallocate $400 million in capital investment that they would have had to allocate for the purpose of completing their [compliance] efforts."

not be said to relate unequivocally to the economic ills of the industry. In addition, at a press conference held on the day that the rescission was issued, the NHTSA Administrator claimed that he placed no reliance "whatsoever" in his "personal decision" on "the current economic slump in the automotive industry."[7]

But NHTSA's published explanation contained no explicit repudiation or rejection of the assertion that had theretofore been made by NHTSA that the economic condition of the automobile industry required amelioration of the passive restraint requirement. While that previously important factor was not, at the ultimate stage, explicitly reaffirmed, it was also not rejected or explicitly disclaimed.

This state of the record is similar to what this Court confronted in *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607 (1980). That case involved the validity of the Occupational Safety and Health Administration's ("OSHA's") benzene standard. When it initially pro-

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[7] Transcript of remarks of Raymond Peck, Administrator, National Highway Traffic Safety Administration, at a news conference on October 23, 1981, at 8.

In answer to the question which immediately followed, however, he said, "It is, of course, a fact that the industry is in distress; but that fact alone cannot ever be a determinative question on the issue of a safety standard. It was certainly not determinative in this case." The use of the words "alone" and "determinative" implies that the state of distress was one factor that was considered, even if not the determinative one. This is consistent with a statement that the Administrator made when opening the press conference. He said (*id.* at 2):

> Other factors, changed since 1977, have also been taken into account. These include, of course, estimates of the cost to the consumer of the technology that would be used, and the economic circumstances of this injury [*sic*]. No one factor has been determinative. My overwhelming concern has been safety.

The word "injury" makes little sense in the context of the full paragraph. The word "industry" fits the context more than any other word with similar sound.

posed its standard—which barred benzene in even very minute quantities such as one part per million parts of air—OSHA had indicated that it was placing the burden of proving safety on industry representatives because it viewed benzene as a carcinogen. This Court's plurality opinion, per Justice Stevens, assumed that in its final decision OSHA had applied the standard it had originally announced in its proposed ruling. *See* 448 U.S. at 623-25, 635-36. In dissent, Justice Marshall noted that OSHA did not have to rely on its "Draconian carcinogen 'policy' " (448 U.S. at 695), and that it had, in fact, conducted seventeen days of hearings and heard from ninety-five witnesses (448 U.S. at 696) on the dangers of benzene in even minute quantities. Justice Marshall then observed that OSHA issued "an extensive statement of reasons summarizing and evaluating the results of the hearings" (448 U.S. at 697), so that its decision was not explicitly based on its "carcinogen policy."

The Court's plurality in the benzene standard case looked, however, not alone at what OSHA had said,[8] but at the standards and principles on which it had relied in its earlier proposed rulemaking. Finding an impermissible standard at that juncture, it carried that standard over to the final ruling and invalidated the ruling, over the dissent of four Justices, because of it. By the same token, the final rule NHTSA issued should be invalidated because the agency never repudiated the judgment that special administrative actions, including delay and amendment of passive restraint requirements, should be taken to accommodate automobile manufacturers because of the economic difficulties of the industry.

It is true, of course, that a reviewing court ordinarily judges an administrative action by the explanation the agency has given. *See Securities and Exchange Commission* v. *Chenery*

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[8] The Court said that "discussion . . . must, of course, *begin* with the Agency's rationale. . . ." 448 U.S. at 631. It did not say that published rationale was the last word on the subject—only that discussion must "begin" with it.

Corp., 318 U.S. 80, 95 (1943); *Federal Trade Commission* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974). There are, however, times when, within the four corners of a particular agency statement, one cannot find the true considerations that led to the agency action. When such considerations have been articulated in earlier public pronouncements, a court should assume that they have influenced the final action taken by the agency.[9] If an agency has specifically reconsidered its earlier published views and determined to repudiate them, it should formalize this determination in the agency's published statement of reasons. If the agency fails to make any such statement, a reviewing court should conclude that notwithstanding the omission of the prior consideration from the final published statement, it continues to have a significant impact on the agency's determination—as this Court held in the benzene standard case.

C. Consideration Of The Economic Condition Of The Automobile Industry Is Beyond NHTSA's Statutory Authority.

It is a fundamental tenet of administrative law that an agency must act within its statutory mandate. *See, e.g., American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 540 (1981); *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 659 (1981); *Atchison, Topeka and Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) (plurality opinion); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-69 (1962). Agency decisions must be "based on a consideration of the

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[9] Compare *American Federation of Government Employees* v. *Devine*, 525 F. Supp. 250, 253 (D.D.C. 1981), where a District Judge rejected reasons stated by the Office of Personnel and Management for taking certain actions and concluded that the motivation was "prompted primarily by ideological considerations." *See also American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 540 n.74 (1981), where this Court refused to accept a "boilerplate" statement as the true reason for agency action and an impermissible consideration had been weighed and expressed by OSHA.

relevant factors" under the authorizing statute. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) (emphasis added). *Accord, Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

The Safety Act directs NHTSA to issue "appropriate" motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. § 1392(a). The agency is also directed to consider whether a proposed standard "is reasonable, practicable and appropriate for the particular type of motor vehicle . . . for which it is prescribed," and "the extent to which such standards will contribute to carrying out the purposes" of the Safety Act. 15 U.S.C. § 1392(f)(3),(4). The Safety Act specifically instructs the agency to consider "relevant available motor vehicle safety data" (15 U.S.C. § 1392(f)(1)), but it does *not* tell the agency to consider the economic health of the automobile industry. The Act's legislative history and judicial decisions interpreting the Act clearly establish that NHTSA has no authority to consider the general economic condition of the automobile industry in deciding when and whether to implement passive restraint requirements.

(1) The legislative history indicates that the economic welfare of the automobile industry is not to be considered by NHTSA.

The purpose of the Safety Act is "to reduce traffic accidents, deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Congress intended "safety . . . [to] be the overriding consideration in the issuance of standards." S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966) (hereinafter "*Sen. Rep.*"). *See also* H. R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966) (hereinafter "*H. R. Rep.*") ("Motor vehicle safety is the paramount purpose of this bill and each standard must be related thereto.")

In enacting the Safety Act, Congress was well aware of the automobile industry's conviction that "safety doesn't sell." *Sen. Rep.* 2. The Report expressed its concern over "the auto-

mobile industry's chronic subordination of safe design to promotional styling and . . . [its] overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection." *Sen. Rep.* 2. While Congress did not foresee the current industry slump, it plainly intended to impose safety standards without capitulating to industry claims that compliance would reduce automobile sales. Senator Mondale, who was heavily involved in drafting the Safety Act, accorded minimal weight to charges that the Safety Act "is unfair to the automobile industry . . . and that the threat of its passage has affected the volume of sales which in turn has influenced the economy." 112 Cong. Rec. 14246. He acknowledged that "the obvious objective of any businessman" was to "attract customers," but emphasized that "there is well documented . . . evidence showing that [the automobile] could be so designed and so constructed as to protect the driver and passengers from death and injury in most kinds of accidents." *Id.*

Representative Ryan noted that auto "industry spokesmen have wailed that this legislation will be damaging to both the industry and the national economy." His answer was that Congress' "primary concern must be . . . the pain, the grief, the permanent disabilities, and the thousands of deaths motor vehicles cause every year. . . . The lives of American citizens must come first." 112 Cong. Rec. 19647. *See* 112 Cong. Rec. 19654 (Rep. Tenzer) (rejecting automobile industry's argument that Safety Act "will have an adverse impact on automobile sales" as invalid "especially when weighed against the purpose of the legislation—the saving of human lives"). These statements all show that Congress did not intend to let the sales curve for the industry determine the death and injury curve on the Nation's highways.

The terms "practicable," "reasonable," and "appropriate," as used in the Safety Act, were not intended by Congress to permit the general economic condition of the automobile industry to enter into decisions to issue or revoke particular safety standards. The Senate Report explained that by requiring that

safety standards be "reasonable" and "practicable," Congress meant that the Secretary was to issue standards covering "only . . . those vehicle characteristics that have a significant bearing on safety," rather than "every component and function of a motor vehicle." *Sen. Rep.* 6. The Senate Report added that "tests of reasonableness of cost, feasibility[10] and adequate lead time"[11] should be included among the factors considered in the development of safety standards under the Act. *Id.*

Floor debates on the bill show that the Senate Report's references to "reasonableness of cost" and "practicability" are to the *direct costs* of the safety device itself, and do not authorize consideration of the general economic condition of the regulated industry. Senator Lausche stated (112 Cong. Rec. 14245 (emphasis added)):

> In the committee, an extensive discussion took place concerning the right of the Secretary to consider the costs that would be entailed in promulgating the adoption of certain types of equipment. It was argued by some that the language did not allow the Secretary to *consider the cost that would be added to the automobile.*

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[10] The Senate Report uses "feasibility" in its ordinary meaning, and clearly intended that the agency was to consider whether the safety requirements mandated by a standard were "capable of being done." *See American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. at 508-09 (defining "feasibility" as "capable of being done, executed or effected").

[11] The Senate Report also indicates that economic factors relating to lead time may be considered under the Act. It stated that in deciding whether to specify an effective date later than the normal one-year maximum for compliance, the agency could consider whether requiring across-the-board compliance within one year is "a practical economic and engineering impossibility, as well as a source of great hardship and unnecessary additional cost." *Sen. Rep.* 7. Like the references to the economic realities of lead time in the House (*see* pp. 16-17 & n.12, *infra*), nothing in this Senate Report statement indicated that the general economic condition of the industry, caused by a sales slump and unrelated to lead time considerations, was meant to be a relevant factor in deciding whether to impose a particular safety standard.

> . . . It was finally agreed to write into the report a certain understanding which was to be used as a guide in interpreting the language used.

The "certain understanding" was then read. It related to the Secretary's authority to consider the costs added to the automobile by virtue of a safety standard. Senator Magnuson, the floor manager and Chairman of the Senate Committee on Commerce, quoted the Senate Report's instruction that "reasonableness of cost, feasibility, and adequate lead time should be included among those factors which the Secretary could consider in making his total judgment." 112 Cong. Rec. 14245.

House floor discussion of the term "practicability" also fails to provide support for NHTSA's consideration of the general economic condition of the industry. The House Report relates the Act's practicability requirement to "consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." *H. R. Rep.* 16. NHTSA relied on this reference to "economic factors" for its published position that the economic condition of the auto industry is a permissible factor in issuing or rescinding the passive restraint requirements. *See* 46 Fed. Reg. 21175 (R. 1275). But the House debates demonstrate that in making "economic factors" relevant under the Act's practicability requirement, Congress intended the agency to consider costs associated with the adequacy of lead time for implementing a particular safety standard, not the general economic health of the automobile industry.[12]

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[12] Representative Dingell, a member of the House Committee on Interstate and Foreign Commerce who was actively involved in the drafting and passage of the Safety Act, explained that "a standard is not practicable or reasonable if it cannot be met by the best efforts of manufacturers within the constraints of time and technology." To assure practicability, "[a]mong those economic factors which the Secretary will have to consider is the matter of adequate lead time." The agency was to consider whether the normal compliance period would cause cause "exorbitant cost or . . . severe economic disloca-

Nor does the Act's "appropriateness" criterion authorize NHTSA's consideration of the sales prospects of the depressed auto industry. The Senate Report indicates that the requirement that safety standards be "appropriate for the particular type of motor vehicle" was included so the Secretary could "consider the desirability of affording consumers continued wide range of choices in the selection of motor vehicles" and that he would not eliminate particular types of cars by applying to them standards that were unsuitable. *Sen. Rep.* 6. The House interpreted the "appropriateness" directive the same way. *H.R. Rep.* 18; 112 Cong. Rec. 19649 (Rep. Dingell). *See also Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 679 (6th Cir. 1972).

In summary, none of the broad terms used in the Safety Act to define the Secretary's authority was intended by Congress to empower him to grant general reprieves based on economic appraisals of the automobile industry. Just as the Federal Trade Commission may not permit manufacturers to engage in unfair and deceptive practices simply because they are in economic difficulties and the Securities and Exchange Commission may not allow the sale of unregistered securities whenever it believes the stock markets are experiencing a slump, NHTSA may not approve the manufacture of unsafe cars merely because automobile manufacturers are experiencing an unprofitable period.

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tion," such as would occur if "the cost of compliance on a crash basis . . . [was] so great as to price vehicles out of the mass market." 112 Cong. Rec. 19648. The Act's practicability criterion authorized consideration of "economic factors" to determine whether it would be "a physical or economic impossibility" for manufacturers to comply with a standard within the normal statutory compliance period. To meet this problem the Secretary was authorized to "make the standard effective later than one year from its issuance if he finds that this is in the public interest . . . ." 112 Cong. Rec. 19648.

(2) No judicial precedent authorizes consideration of this factor.

In light of the clear legislative history, none of the cases construing the Safety Act even discusses the possibility that the general economic condition of the regulated industry can be a relevant factor for safety standard decisions. The cases hold only that the agency may consider whether a standard is so onerous that it cannot be performed by those subject to it. In *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 672-73 (6th Cir. 1972), which endorsed NHTSA's authority to issue the prior 1972 restraint standard requiring development of new technology, the court stated that the Act's mandate did not "suggest that the Agency might impose standards so demanding as to require a manufacturer to perform the impossible, or impose standards so imperative as to put a manufacturer out of business." In *H & H Tire Co.* v. *Department of Transportation*, 471 F.2d 350, 354-55 (8th Cir. 1973), the court agreed "that 'the fact that a government regulation may cause economic hardship to a party does not make such regulation unreasonable.' " *See also, National Tire Dealers & Retread Association, Inc.* v. *Brinegar*, 491 F.2d 31, 33, 37-38 & n.34 (D.C. Cir. 1974). These cases do not suggest that NHTSA may properly consider the auto industry's short-term economic interests in making a safety-standard decision.

In like vein, nothing in the discussion of economic feasibility in *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490 (1981), suggests that an agency may consider the current economic distress of an industry, as distinguished from an inquiry into its basic economic viability under the particular regulation. That case held that a regulation is economically feasible if it permits the affected industry to "maintain long-term profitability and competitiveness." 452 U.S. at 530-31 n.55. It cited with approval two cases that stand for the proposition that a statute's feasibility qualification

> is not intended to provide a route by which recalcitrant employers or industries may avoid the reforms contemplated by the Act. Standards may be economically

> feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. . . .

Industrial Union Department v. *Hodgson*, 499 F.2d 467, 478 (D.C. Cir. 1974); *accord*, *United Steelworkers of America* v. *Marshall*, 647 F.2d 1189, 1265 (D.C. Cir. 1980), *cert. denied sub nom. Lead Industries Association, Inc.* v. *Donovan*, 435 U.S. 913 (1981).

Under *American Textile Manufacturers Institute* v. *Donovan*, when a regulation issued under a statute with a feasibility requirement threatens to put the affected industry out of business or to cause massive economic disruption, it is appropriate for an agency to examine the rule's impact on production, employment, competition, and prices in order to determine whether compliance is "within the financial capability of the covered industry." 452 U.S. at 530-31 n.55. But that is not what NHTSA did. No claim was nor could have been made that the average incremental cost of the passive restraints would drive auto manufacturers out of business by pricing cars out of the reach of ordinary consumers, or that compliance would require exorbitant capital expenditures by the industry, or that the standard would otherwise catastrophically disrupt the industry. Rather, NHTSA considered the economic condition of the industry out of a desire to improve auto sales and profits. That consideration conflicts with the feasibility analysis contemplated by *American Textile Manufacturers Institute* v. *Donovan*, or by any other case of which we are aware. NHTSA's appraisal of the economic health of the auto industry was as fully outside its statutory authority as was OSHA's wish "to repair general unfairness to employees . . . unrelated to achievement of health and safety goals" when it issued a wage guarantee provision in its Cotton Dust Standard. *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. at 540. Consequently, NHTSA's rescission of the passive restraint requirement, affected by this consideration, must be set aside.

II

NHTSA ACTED IRRATIONALLY AND ARBITRARILY IN FAILING TO RETAIN THE PASSIVE RESTRAINT REQUIREMENT WITHOUT THE ALLEGEDLY INEFFECTIVE AUTOMATIC BELT OPTION BY REQUIRING AIR-BAGS.

In the first portion of this *amicus* brief we have argued that NHTSA's expressed reasons for rescinding the passive restraint requirement should not be taken as the total rationale for its decision. A reviewing court should determine the validity of the rescission in light of the agency's previously expressed—and still unrepudiated—policies on the same subject, which laid great stress on the poor economic condition of the industry. We turn now to an alternative argument that takes NHTSA's explanation at face value. Even if the Court were to ignore the various public statements indicating that NHTSA accommodated automobile safety to the economic needs of the automobile industry and were to look no further than the final rule and RIA of October 23, 1981, it is patent that the agency's explanation is illogical and irrational. The conclusion reached by the agency—that the safety standard should be rescinded *in toto*—does not follow from the findings and policies announced by NHTSA.

We begin with a proposition that NHTSA does not question at any point in its statements of October 23, 1981—that automatic or "passive" crash protection is a highly desirable goal. Commitment to that objective is expressed at the beginning of NHTSA's explanations of the rescission and is even more firmly repeated in the concluding paragraph of the "Summary of Agency Conclusion" (46 Fed. Reg. 53426 (Pet. App. 116a) (emphasis added)):

> After 12 years of rulemaking, NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits. *The agency is still committed to this goal* . . . .

Safety Standard 208 sought to implement this objective by authorizing automobile manufacturers to use either of two

passive restraint devices—(1) an air cushion restraint ("air-bag") or (2) an automatic belt (which does not require buckling by the occupant). There was no suggestion in the history of the development of Safety Standard 208 that if only one of these two options had been technologically feasible, no passive restraint system would have been initiated. In other words, the availability of equally effective alternative technologies was not a precondition of NHTSA's institution of the safety standard. If only air-bags had been technologically developed by 1977, it is clear that a passive restraint standard requiring the use of air-bags would have been issued at that time. Indeed, in 1977 it had been estimated that more than sixty percent of new cars would be equipped with air-bags, and less than forty percent with automatic belts. 46 Fed. Reg. 53420 (Pet. App. 95a). Automatic belts were added to the safety standard as an alternative only because it was then thought that automatic belts were as effective as air-bags in achieving the safety goal. It would have been unfair to automobile manufacturers to bar use of an alternative passive restraint that was no less protective.

NHTSA has now determined that detachable automatic belts will not achieve the desired result. We disagree with this conclusion, which was rejected by the court of appeals and is forcefully challenged in the respondents' briefs. Respondent State Farm demonstrates cogently in its brief that nondetachable automatic belts do not share the problems of detachable automatic belts which led the agency to its conclusion. But even resolution of the detachable/nondetachable debate in favor of petitioners would not justify acceptance of NHTSA's rescission of the entire passive restraint standard. No rational decision-maker could conclude from any finding made by NHTSA that air-bags should no longer be required.

This is the point at which there is an unbridgeable chasm between NHTSA's new finding and the conclusion that no passive restraints should now be required. Rather than reverting, as reason requires, to the remaining uncontestedly effective passive restraint (which was initially to be the primary

technology used by the industry), NHTSA has, without a single word critical of air-bags, discarded totally the passive restraint obligation it initially imposed on automobile manufacturers and thereby sacrificed the lives of thousands of Americans.

Absolutely no reason was given in NHTSA's published statements of October 23, 1981, for the rejection of air-bags as an obligatory form of passive restraint.[13] It appears that the only reason for refusing to consider air-bags was that the automobile manufacturers had previously determined to comply with Safety Standard 208, if it was to be enforced, by installing automatic belts rather than air-bags.[14] This industry decision—which was doubtless based on the anticipated greater costs of air-bags than belts—effectively controlled

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[13] Petitioner MVMA asserts that "the existing record abounds with references to the difficulties that an airbags-only standard would raise, including questions about the installation of airbags in small cars . . . ." MVMA Brief at 39 n.71. This assertion has not, however, been made by the responsible agency, and it cannot, therefore, be a basis for sustaining the agency's decision. Moreover, when NHTSA promulgated the 1977 passive restraint requirements, it said (42 Fed. Reg. 34289, 34295 (1977) (R. 1740)):

> Although the shorter crush distance of small cars may impose more stringent limits on air bag deployment time, . . . there are no insuperable difficulties in meeting the . . . requirements of Standard 208 in cars as small as 2,000 pounds . . . with existing air bag designs.

In addition, NHTSA continues to find that air-bags are technically sound. *See, e.g.*, RIA at XI-4-5 (R. 264-65).

[14] *See* RIA at XI-6 (R.226):

> Whether the auto companies are right or wrong [in deciding not to use air bags], the Agency cannot change their decision. Since air bags will *not* be used to comply with the standard, the analysis must focus on automatic seat belts.

See also RIA at XI-5 (R. 265) ("The issue of air bags . . . is not in fact squarely before the Agency at this time. . . . Manufacturers' plans for compliance, at least in the short run, do not include air bags.")

NHTSA's judgment. On the premise that only one percent of new cars would be equipped with air-bags, NHTSA did not even discuss the effectiveness of air-bags in achieving the still-desired safety goal.

Here, again, NHTSA's reasoning was hopelessly illogical. Obviously, if automatic belts were eliminated as a permissible alternative because they are ineffective in achieving the desired safety result, 100 percent of new cars, rather than one percent, would be equipped with air-bags.

NHTSA does not appear to question in the slightest the effectiveness of air-bags. Indeed, its "Summary of Agency Conclusion" refers to the "almost certain benefits that had been anticipated as a result of the use of air bag technology." 46 Fed. Reg. 53425 (Pet. App. 112a).[15] NHTSA has also referred to the added economic incentives for air-bag use provided by "premium reductions generally . . . available only to owners of cars equipped with air bags. . . ." 46 Fed. Reg. 53423 (Pet. App. 106a). There are, therefore, significant and unrebutted benefits in the use of air-bags, which, by any rational standard, should remain as required safety features in new automobiles.[16]

NHTSA's total failure to consider and implement the remaining effective and technologically sound passive restraint is the same kind of error that caused this Court to direct that an agency's determination be vacated in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946). The Federal Trade Commission had totally prohibited use of the name "Alpacuna" on coats because it believed that the name was misleading and deceptive. This Court held it to have been

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[15] Air-bag technology has continued to improve, and air-bags are being used as options in highly desirable automobiles. *See New York Times*, February 3, 1983, p. D2, reproduced as Appendix C to this brief.

[16] Although air-bags do cost more than automatic belts, they are still cost-effective. *See* Nordhaus Comment, May 1981, at 15 (R. 525).

error for the Commission "not to have considered" whether qualifying language accompanying the name "would eliminate the deception which it found lurking in the word Alpacuna." 327 U.S. at 613. The Court said (*id.*):

> [T]he Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. . . . [W]e are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate.

By the same token, NHTSA failed to consider how the consistently approved safety goal of requiring an effective passive restraint could be reconciled with its recent conclusion that automatic belts cannot do the job. That was the agency's responsibility, and, as was true in *Siegel*, a reviewing court is "left in the dark" whether action short of rescission—particularly implementation of an air-bag requirement—would not satisfy both objectives. Indeed, by any rational measure, that is the way both objectives could and should be achieved.

Nor was there any procedural obstacle to NHTSA's amendment of Safety Standard 208 to prescribe the use of air-bags only. NHTSA had authority to amend Standard 208, and as the government concedes, "NHTSA in fact did consider" amending the standard to mandate compliance by belts with a use-compelling feature. Brief for the Federal Parties at 36; *see* 46 Fed. Reg. 53424 (Pet. App. 109a-110a). It is therefore difficult to understand how the government can now contend that if NHTSA had amended Standard 208 to require compliance by air-bags "it might have faced challenges from the manufacturers and others on the ground that its notice of proposed rulemaking did not give adequate warning that such a rule might be adopted." Brief for the Federal Parties at 37.

In any event, the notice of rulemaking was adequate to have permitted NHTSA to amend Standard 208 to bar detachable belts and require compliance by air-bags or nondetachable belts, since it identified one of the issues as "the most effective and reasonable approach to addressing the safety problems posed by the low rate of safety belt use." 46 Fed. Reg. 21206

(R. 13). Commentators responding to the notice understood that the scope of the rulemaking encompassed possible amendments to Standard 208, and several commentators suggested on the record that detachable belts be barred. *See* 46 Fed. Reg. 53424 (Pet. App. 109a). It is well established that "[a]n agency need not publish in advance every precise proposal it may ultimately promulgate as a rule." *McCulloch Gas Processing Corp.* v. *Department of Energy*, 650 F.2d 1216 (Temp. Emer. Ct. App. 1981). Notice is sufficient if it apprises interested persons of the "subject and issues" before the agency and therefore affords a reasonable and meaningful opportunity to participate in the rulemaking process. *McCulloch Gas Processing Corp.* v. *Department of Energy*, 650 F.2d at 1221; *Forester* v. *Consumer Product Safety Commission*, 559 F.2d 774, 787 (D.C. Cir. 1977); *International Harvester* v. *Ruckelshaus*, 478 F.2d 615, 632 n.51 (1973). So long as the agency furnishes such notice of the subject and issues, the final regulations actually adopted may be "substantially more stringent" than the proposals outlined in the notice of rulemaking. *American Iron & Steel Institute* v. *Environmental Protection Agency*, 568 F.2d 284, 293 (3d Cir. 1977); *International Harvester* v. *Ruckelshaus*, 478 F.2d at 632 n.51; *McCulloch Gas Processing Corp.* v. *Department of Energy*, 650 F.2d at 1221.

In summary, NHTSA arbitrarily and irrationally refused to direct use of air-bags or even to evaluate their cost-effectiveness simply because the auto industry was not planning to install them. In this way it allowed an anticipated industry preference for allegedly ineffective technology to define the agency's inquiry into the reasonableness and practicability of the safety standard. NHTSA thus failed to discharge its statutory duty independently to promulgate reasonable and practicable safety standards to protect the American public from unnecessary injury and death on the nation's highways. Precisely because NHTSA lost sight of this statutory duty, no "rational connection exists between the facts found" by NHTSA—that automobile manufacturers intended to install detachable automatic belts and that such belts were functional-

ly equivalent to manual belts—and the decision NHTSA made to rescind the entire passive restraint standard without considering whether compliance with air-bags would render it reasonable and practicable. *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962). For this reason, NHTSA's rescission order is arbitrary and capricious, and must be set aside.

III

THE CASE SHOULD BE REMANDED TO THE COURT OF APPEALS EITHER TO DIRECT NHTSA TO ENFORCE THE AIR-BAG REQUIREMENT OR, IF PETITIONERS PREVAIL, TO HAVE THAT COURT APPLY THE CORRECT STANDARD

Our final point relates to the matter of remedy. We submit that in any event, whether petitioners or respondents prevail, the court of appeals must be called upon to make substantive judgments beyond those it has already made. If the respondents are upheld in their contention that NHTSA erred in failing simply to strike the detachable automatic belt alternative, or if the Court agrees with us that at least the air-bag option should have been imposed, the court of appeals should be instructed to direct the agency promptly to amend Safety Standard 208 in accordance with this Court's conclusion. As we demonstrate below, it is well within the authority of reviewing courts to take such direct measures.

If, on the other hand, petitioners prevail in their argument that the court of appeals "misapprehended or grossly misapplied" the correct standard of review, the case must be remanded to the court of appeals for *that* court to apply the correct standard. This Court's decisions clearly establish that this is a task that must be assigned to the court having the primary reviewing function and should not be assumed by the court which has only an appellate role.

A. The Court Of Appeals Should Order NHTSA To Issue An Amended Safety Standard.

The court of appeals was not prepared to issue an order directing implementation of an amended Safety Standard 208. It gave NHTSA time to submit a proposal for "resolving the questions raised" in its opinion, and thereafter directed that the standard be implemented for the 1984 Model Year. If this Court were now to conclude that it was irrational for NHTSA to rescind rather than amend Safety Standard 208, the appropriate remedy would be to direct the agency to issue the amendment. That direction should be given, of course, by the court of appeals on remand of the case from this Court.

If an agency fails to implement and enforce its organic regulatory statute, courts may order the administrative action that the agency itself should have undertaken. In the leading case of *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*), the court of appeals agreed with the district court's conclusion that the then-Department of Health, Education and Welfare had failed to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976). It then upheld with minor modifications, the district court's order directing the agency to enforce Title VI by, *inter alia*, commencing administrative enforcement proceedings against certain segregated school districts, demanding explanations of racial disproportion from other school districts, and monitoring districts under court desegregation orders. 480 F.2d at 1161. This judicial action was a fitting exercise of the judiciary's responsibility "to assure that the agency properly construes its statutory obligations, and that the policies it adopts and implements *are consistent with those duties and not a negation of them.*" 480 F.2d at 1163-64 (emphasis added).

In *Davis* v. *Romney*, 490 F.2d 1360 (3d Cir. 1974), the Third Circuit found that the National Housing Act imposed a duty on the Federal Housing Administration to "make reasonable efforts to ascertain that the homes securing FHA-insured mortgages meet Housing Code standards" (490 F.2d at 1368), and held that a reviewing court could order injunctive relief

tailored to remedy the harm to the plaintiffs inflicted by the agency's failure to conform to the requirements of its regulatory statute. 490 F.2d at 1370. *See also Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 593-95 (D.C. Cir. 1971); *Rockbridge* v. *Lincoln*, 449 F.2d 567, 569-70 (9th Cir. 1971).

These cases establish that even in areas generally left to agency discretion, courts may order agencies to take particular administrative action necessary to effectuate the congressional intent expressed in the agency's organic statute. *See* Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1197-98 & n.13 (1982); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1755 (1975) ("When the agency has clearly failed to protect the beneficiaries of the administrative scheme, courts have gone so far as to mandate appropriate enforcement measures.")[17] In this case NHTSA may and should be promptly

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[17] *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), is not to the contrary. The Court observed in *Dunlop* v. *Bachowski* that the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 481 *et seq.*, "relie[d] upon the special knowledge and discretion" of the Secretary of Labor to determine whether to bring suit to set aside union elections. 421 U.S. at 576. Accordingly, the Court directed that generally "the court's review should be confined to examination of the [Secretary's] 'reasons' statement, and the determination [of] whether . . . the decision . . . [was] arbitrary and capricious . . . [without an adjudicatory hearing on the complainant's] challenges to the factual bases for the Secretary's conclusion. . . ." 421 U.S. at 572-73. *Dunlop* v. *Bachowski* specifically left open the possibility that the reviewing court could find the Secretary's decision to be arbitrary and capricious and would then be "empowered to order the Secretary to bring a civil suit against the union to set aside the election." 421 U.S. at 575. The Court recognized that compelling the Secretary to bring suit "obviously presents some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary," but it then suggested, by citing *National R.R. Passenger Corp.* v. *National Assoc. of R.R.*

ordered to issue an amended Safety Standard incorporating the technologically suitable means for achieving automatic or passive restraint in cases of automobile crashes.

B. The Court Of Appeals Has The Primary Duty To Apply The Correct Legal Standard To The Record.

We turn now to a second possibility—*i.e.*, that this Court may hold that petitioners are correct in their challenge to the standard of review actually applied by the court of appeals. If this Court were to uphold that argument, it would be inappropriate for this Court to rule directly on the validity of NHTSA's rescission of Safety Standard 208. This Court should, rather, remand the case to the court of appeals so that court could apply the correct standard to the voluminous administrative record.

This Court has said frequently that it intervenes in the review of agency decisions by courts of appeal "only when the standard [of judicial review] appears to have been misapprehended or grossly misapplied." When that happens, this Court traditionally remands the case to the court of appeals for its consideration in light of the correct standard. *National Labor Relations Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962). *See Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491, 497 (1951); *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621 (1966); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547, 549 (1978).

This limited role is consistent with the course this Court has recently instructed courts of appeal to take in reviewing district court judgments. In *Pullman-Standard* v. *Swint*, 102 S.Ct. 1781 (1982), this Court reversed a decision of a court of

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Passengers, 414 U.S. 453, 465 (1974) (Brennan, J., concurring), and *Nader* v. *Saxbe*, 497 F.2d 676, 679-80 n.19 (D.C. Cir. 1974), that even in situations involving prosecutorial discretion, a court may order the agency to pursue judicial action if its refusal to do so " 'went [beyond] any rational exercise of discretion.' " *National R.R. Passenger Corp.*, 414 U.S. at 465.

appeals which had not only vacated a district court's factual conclusion but had entered its own contrary finding. This Court said (102 S.Ct. at 1791-92):

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . . Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.

In this analogous situation, this Court should, if petitioners prevail, remand this case to the court of appeals so that it may review the administrative record by the correct legal standard.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents and *amici* supporting their position, the decision of the court of appeals invalidating NHTSA's rescission of Safety Standard 208 should be affirmed or the case remanded to the court of appeals with instructions to direct NHTSA to issue promptly an amended Safety Standard requiring installation of effective passive restraints in new automobiles.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
ANNE SHERE WALLWORK
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Attorneys for the
American Insurance Association,
Amicus Curiae

February 7, 1983

APPENDIX A

Makers tell Reagan of worry, recommend actions to help

By Brian Rahe
Automotive News Staff

WASHINGTON — Domestic vehicle makers have sent a letter to President Reagan, spelling out the industry's concerns in the areas of capital formation, government regulation, Japanese competition and general economic welfare.

A specific position paper on recommended changes in the Clean Air Act is also under consideration but is not yet complete.

Automotive News has learned the fairly lengthy letter to the President stresses reductions in federal spending to aid the economy and reduce pressure on capital markets.

In the area of trade, the recommendation was closer to the task taken by General Motors than to Ford Motor Co.'s calls for temporary quotas.

The industry urged the President to take the initiative in persuading the Japanese government to voluntarily reduce immediately and substantially the flow of Japanese cars into the U.S. for a considerable but undefined period.

The industry also asked that regulation be reduced when big cost savings can be made with minor societal effects.

• The President was also asked to encourage investment in U.S. business via better capital cost recovery allowances and a refundable tax credit. He was encouraged to expand R&D with tax incentives and extend energy tax credits for investments made to produce more fuel-efficient products.

Accompanying the letter to the President, Automotive News has learned, was a fuller supporting document. It urged capital formation and envisioned depreciation measures similar to those in the Jones-Conable bill and popularly known as 10-5-3.

It called for refundable tax credits, refundable R&D tax credit and an extension to 10 years of the 7-year limit on carrying forward excess investment tax credits and net operating losses.

It also asked for a reduction in the corporate tax level to 45 percent.

The domestic makers urged that the average useful life for machinery be reclassified from the current 12 years to nine.

It called for a special tax write-off, applicable in the vehicle year it is placed in service, and an expansion of the energy tax credit to cover equipment used to make fuel-efficient vehicles. This should be refundable, they said.

The industry also wants the National Ambient Air Quality Standards to be set only to protect the public against unreasonable risk of significant health effects.

It wants to create an independent review group, require risk analysis, provide peer review for all proposed standards and allow five amendments a year for each short-term standard if the current standard is retained.

• The industry wants less stringent CO and NOx levels for cars and trucks. It wants a maintenance standard for HC (apparently leaving to Ford's petition) which would mean 0.39 gpm instead of the current maximum 0.41 gpm.

The industry wants the 1982 diesel particulate standards retained unless EPA can show a need for stricter control—a position well-known to be GM's.

For heavy-duty truck emission standards, the industry wants to maintain current test procedures instead of the ones proposed for '84 models.

It also wants a change in the definition of "useful life" to reaffirm the half-life concept.

It wants a 40-percent failure rate allowed for assembly-line testing of heavy and light trucks, instead of the current 20-percent failure rate.

The industry wants to maintain 1982 high-altitude requirements instead of the '84 model-year provision which would require a common standard at all altitudes. Ford has been especially concerned about high-altitude rules despite some concessions from EPA.

For light trucks, the industry wants the 1984 extended useful life durability requirement eliminated. It wants averaging, instead of car-by-car compliance, for emission standards. It also wants to use averaging for production certification of prototypes and recalls.

Leadtime should be figured from the date of the promulgation of a rule, domestic makers said. And they urged EPA to consider cost-effectiveness analyses for all its proposed regulations.

As for noise standards—which have just been delayed for a year—the industry wants the ill-fated standard withdrawn and no further action until a need is clearly shown.

The industry wants DOT to reevaluate the need for the passive-restraint standards. It also wants a reduced bumper standard—down 1 MPH to 2.5 MPH for longitudinal forces and a reduction in corner requirements to 1.5 MPH.

The industry wants no fuel-economy standards beyond 1985. And it wants DOT to look at both the economic impact of new standards and the cumulative impact of existing standards when comparing safety benefits.

Automotive News

February 9, 1981

Technology | Marshall Schuon

Car's Air Bag: How It Works

WHEN Mercedes-Benz announced last week that it would offer an air bag restraint system in some of its 1988 cars, company officials said they knew the move would intensify a debate that has been under way for the last 14 years. But, they said, the technology that is at the heart of the argument has been tested successfully in more than 20 million miles of driving, and the only thing that remains uncertain is customer demand.

Air bags — devices that inflate to protect occupants in a head-on crash — seemed to be a good idea when they were proposed in the late 1960's. It was not long, though, before criticism and doubt began to pile up. In particular, critics said, the sodium azide that was used to generate the inflating gas was dangerous and, perhaps, carcinogenic. Further, it was said, the bags could inflict injury if they inflated inadvertently, and the cost of the complicated system would add greatly to the price of a car.

Nonetheless, passive restraints — air bags or automatic seat belts — were mandated by the Federal Government in 1977, with enforcement to begin with full-size 1982 models. After postponements, the rule was rescinded last Oct. 29 as part of the Reagan Administration's easing of regulations in the ailing auto industry. Consumer groups protested, however, and the matter is pending.

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The 1988 Mercedes system will be available on the large S-class sedans and on the 300E and 300D coupe-is that will come to America in October. According to the company, these models will account for 60 percent of sales here, and the system will be considered successful if it is ordered on 30 percent of the cars.

The system provides an air bag and knee bolster for the driver and a seat belt tensioner for the front-seat passenger. The tension device is triggered by the same computer that activates the air bag, and it withdraws the normal seat belt slack-ness to hold an occupant firmly in place. The knee bolster keeps the driver from "submarining" under the wheel in a frontal crash.

Drawing of air bag to be available in some 1988 Mercedes-Benz cars. It will cushion driver's head and chest, while a tensioning retractor will pull slack out of passenger's seat belt.

The brain of the system is an electronic deceleration sensor, which, aside from other functions, according to the company, is "to detect an accident, react accordingly, monitor readiness of the air bag and store information." To do this, the black box on the transmission tunnel uses an accelerometer to convert deceleration into an electrical signal. The signal is amplified and processed by an integrated circuit and, in the event of a crash at the equivalent of 12 miles an hour into a fixed barrier, a current ignites a canister of sodium azide to inflate the air bag.

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The bag itself is made of neoprene-coated nylon and is folded on top of the canister inside the hub of the steering wheel. The 60 grams of sodium azide are stored in the form of sapphire-sized tablets in the canister. They ignite rapidly, much like bleach powder in open air, and release a cloud of nitrogen to fill the bag, popping open the center of the steering wheel and presenting a horn-shaped bottom to cushion the driver.

The bag has four venting holes, each about an inch in diameter, and it deflates when the driver hits it. Inflation takes only one-thirtieth of a second, according to the company, and the whole "accident event" from impact to deflation to inflation to deflation takes less than a second. At the same time, current also ignites a tiny charge in the seat belt tensioning device on the floor at the passenger's door pillar. The explosion drives a piston to retrieve a pulley that retracts the seat belt, eliminating slackness.

According to the company, 12,000 of the units have been sold in Europe since a phase-in began in December 1985. In that time, official reports show, 37 of the cars have been involved in accidents, only five of them severe enough to activate the air bags. Of these five, only one involved an injury. In that one, the driver was not wearing a seat belt and suffered a cut thumb.

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Additionally, according to the company, there have been no reports of inadvertent deployment of the air bags, a fact attributable to several failsafes in the system. One of them is a mercury switch, which must be closed by impact before current can flow to the sodium azide. Another is the accelerometer, which decreases its sensitivity as an impact deviates from the center line of the vehicle.

Company engineers rebut the argument against the dangers of sodium azide by noting that its storage and the way it is used pose no threat. For one thing, they say, it releases harmless nitrogen when burned. For another, tests have shown that it will not detonate through shock. At one point, Mercedes tested the canister by firing at it with an armor-piercing rifle. The bullet caused the chemical to burn, the engineers said, but it did not explode.

Replacement of the unit — done by changing the entire steering wheel — is recommended every six years, because the air bag deteriorates along its folds. The sodium azide, on the other hand, has an indefinite life. If there is one problem with the sodium azide, it comes when a car is junked. Even then, according to the company, it can be purposely triggered, harmlessly recycled.

APPENDIX C

APPENDIX B

THE NEW YORK TIMES

February 3, 1983

A14

Tire-Rating System, Reliability Disputed, Is Suspended by U.S.

By MICHAEL deCOURCY HINDS

Special to The New York Times

WASHINGTON, Feb. 2 — The Reagan Administration today suspended a grading standard that provides consumers with information for comparing the durability of 89 brands of automobile tires in 2,000 sizes and styles.

The Administration and most major manufacturers of replacement tires, a $9 billion industry in 1982, contend that the tread-wear grading system is unscientific and that consumers may be misled by it.

Raymond A. Peck, Administrator of the National Highway Traffic Safety Administration, said today, "We just cannot reliably tell whether a higher-graded tire will wear better than a lower-graded tire. The standard is not only failing in its primary purpose of informing consumers, it is misleading some of them."

In spite of the standard, including consumer advocates, one tire maker and some Government and independent engineers, contend that the grading system is reliable and that errors in the ratings generally favor the consumer. Errors in the system, are known and could be easily corrected, they say.

"Consumers want and need a grading system to make informed purchases of tires, and the system does correctly rank-order tires," said Robert E. Berdahl, a vice president of the Uniroyal

Continued on Page A14, Column 1

AGENCY SUSPENDS TIRE-GRADING RULE

Continued From Page A1

Tire Company. The company, which primarily supplies tires to the General Motors Corporation, regularly advertises its tires' tread-wear ratings as a way to increase its sales of replacement tires.

Martin J. Wertheim, a spokesman for the Michelin Tire Corporation and today that the company, which strongly opposed the ratings, significantly underrated its tires "to show our disregard for the procedure."

Today the safety agency also dropped tire makers to delete references to the grading system when making new claims for tires. This action makes the suspension, even if temporary, will have a long-term effect.

The tread-wear rating is currently stamped on every tire sold in this country. The ratings are expressed in grades, with every 10 grades equaling 2,000 miles. An explanatory label pasted on each tire contains statements that the ratings should be used for comparative purposes only and that tire performance varies considerably with driving habits, climate and road surfaces.

Under the standard, companies put their tires through a 6,400-mile road test monitored by the safety agency, then assign their own tread-wear ratings. The Federal agency spot-checked tires to make sure ratings were not overstated, but it had no power to reinspect companies' tires underrating tires and, thus, making comparisons difficult.

Research Project Under Way

The six independent research companies that do most of the testing are under contracts with the tire makers or with the Government. Spokesmen for several research companies said the test procedures needed improvement but that the standard was workable and useful.

The Administration has already begun a two-year research project to see if improvements can be made or if the program should be eliminated. A Government official who favors the program said he did not expect the grading system to survive. He added that the safety agency stopped enforcing the standard last July and dismissed its inspectors.

Mr. Peck, of the federal safety agency, said he had an open mind about the standard. "If we had really intended to kill the standard, we would have made comments about the ratings off the cuff and paperwork unnecessary," he said. "I am not shy about rescinding a standard and that is not what I did. We are suspending it and doing research on it because the standard has the capacity to be misleading."

The Vice President's Task Force for Regulatory Relief selected the standard as a target for repeal last year. The safety agency said the suspension would save the industry part $10 million a year, or about 6 cents on the cost of a tire. Allowing consumers to select ... with the standard as they ... duce new tires will ... save them $30 million more, according to the agency.

Ruling Called 'Hypocritical'

Consumer advocates reacted to the suspension angrily. Joan Claybrook, president of Public Citizen, a Ralph Nader group, said, "The ambitious proponents of the tread-wear standard is hypocritical for an Administration that claims to want the free market to work."

Miss Claybrook, head of the safety agency in the Carter Administration, said the tire was the most complex part of a car and was generally the most expensive replacement part, costing owners an average of $300 every three years.

A January 1981 national survey conducted by Uniroyal found that 39 percent of the 750 respondents knew about tread-wear grades and that 47 percent of them thought it was the most important tire quality to be tested.

The tread-wear regulation was the most important part of the Uniform Tire Quality Grading System. The system also requires manufacturers to rate tire traction and heat resistance, but these two ratings, which vary little among most tires, have not been challenged.

Problems in Tests

No one disputes that the tread-wear tests have technical problems. In a June 1980 internal memorandum, A.E. Pehill, Jr., an engineer for the traffic safety agency, listed many irregularities in test procedures and concluded that the tests could be greatly improved. Uniroyal, in a Jan. 23 petition to the agency, also identified many technical flaws and their solutions.

The uniform grading system was mandated in 1966 by Congress, which required it to be in place by 1968. The action came after the Federal Trade Commission found that there was "a great deal of consumer confusion and deception" concerning tire sizes. Among other things, the manufacturer's third-rate tire was often sold as a premium tire under a private label.

"The price of a tire has no determinable relationship to its quality or safety level," said Paul Rand Dixon, the F.T.C. chairman at the time.

The traffic safety agency issued its regulation in 1971, after a successful lawsuit by a Nader group. The tire industry objected to the test procedures, but the rule was upheld by the United States Court of Appeals for the Sixth Circuit.

"This situation calls for reasonably fair and reasonably reliable grading procedures, not theoretical protection," the court stated in 1976. Consequently, the grading system was put into effect, starting with best tires in March 1979 and ending with radial tires in March 1980.

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CLERK

Nos. 82-354, 82-355 and 82-398

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*, *Petitioners*
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, *Petitioners*
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*, *Petitioners*
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION AS *AMICUS CURIAE*

PHILIP R. COLLINS
1026 — 16th Street, N.W.
Washington, D.C. 20036
(202) 347-8899
Counsel for *Amicus Curiae* Automotive Occupant Protection Association

Of Counsel:
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

February 7, 1983.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in concluding that rescission of the passive restraint requirement in Modified Standard 208 was rendered arbitrary and capricious because the agency did not first consider some other version of a passive restraint requirement, namely air bags to satisfy the statutory criteria?

2. What exactly is an air bag passive restraint system?

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MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*, *Petitioners*

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STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION AS *AMICUS CURIAE*

OPINIONS BELOW

The June 1, 1982 opinion of the court of appeals (Pet. App. 1a-76a) is reported at 680 F.2d 207. The August 4, 1982 supplemental order and memorandum of the Court of Appeals (Pet. App. 79a-82a) are not reported. The decision of the Administrator of the National Highway Traffic Safety Administration rescinding the passive restraint requirements of Federal Motor Vehicle Safety

Standard 208 (Pet. App. 88a-129a) is published at 46 Fed. Reg. 53419.

JURISDICTION

The jurisdiction of the court of appeals rested on 15 U.S.C. § 1394(a)(1). The judgment of the court of appeals (Pet. App. 160a-161a) was entered on June 1, 1982 and the supplemental order of the court of appeals (Pet. App. 79a-80a) was entered on August 4, 1982. The petitions for a writ of certiorari in Nos. 82-354 and 82-355 were filed on August 30, 1982. On August 24, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 82-398 to and including September 8, 1982, and the petition was filed on that date. The petitions for a writ of certiorari were granted on November 8, 1982. Leave to file a brief *amicus curiae* by the Automotive Occupant Protection Association was also granted on November 8, 1982.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 706, and the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 et seq., are reproduced at Jt. App. 162a, 163a.

STATEMENT

This *amicus* adopts the Statement to be found in the Brief of Respondents, National Association of Independent Insurers, et al., but incorporates by reference herein as important background information the statement of the case and the passive restraint history to that date (*circa* 1978-1979) as found in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Pacific Legal Foundation* v. *Depart-*

ment of Transportation, et al., 593 F.2d 1338, 1340-1343 (D.C. Cir. 1979), cert. den., 444 U.S. 830 (1979).

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT RESCISSION OF THE PASSIVE RESTRAINT REQUIREMENT IN MODIFIED STANDARD 208 WAS RENDERED ARBITRARY AND CAPRICIOUS BECAUSE THE AGENCY DID NOT FIRST CONSIDER WHETHER SOME OTHER VERSION OF A PASSIVE RESTRAINT REQUIREMENT, TO WIT AIR BAGS, WOULD SATISFY THE STATUTORY CRITERIA

Though the whole notion of a safety standard for automobiles commenced and was considered from its inception to be an "air bag standard," both by the Executive Branch and its agency of supervision, NHTSA, and the Congress of the United States, the Court of Appeals was eminently correct when it concluded that NHTSA's "analysis of airbags was non-existent" in Notice 25. While the United States Court of Appeals for the Sixth Circuit labeled the standard as "more descriptively the Air Bag Standard" in *Chrysler Corporation* v. *Department of Transportation*, 472 F.2d 659, 664, the agency did not deal with air bags as an obvious alternative, because "domestic manufacturers have decided to use" easily detachable seat belts rather than air bags to comply with the standard.

The Solicitor General uses two main arguments why the failure of NHTSA to consider some use-compelling version of a passive restraint requirement was not arbitrary and capricious. He proclaims firstly that the agency "concluded that it should not do so, based on past congressional reaction to use-compelling devices, public fears about being trapped, and the possible complication of extrication after an accident." The Solicitor General

directed this statement to "continuous belts" and not air bags and the citation supporting these items of Congressional reaction, fear of being trapped and complications of extrication make reference to ignition interlocks or continuous seat belts—not to air bags.[1]

With regard to air bags, the Government brief speaks of the costs "acknowledged" by the appellate court and also argues that "there is no reason in law, policy or common sense why NHTSA was required to retain on the books the one passive restraint requirement that it already had evaluated and found wanting," specifically air bags. *Brief for the Federal Parties*, pp. 36-38. But, the fact of the matter is that NHTSA has not reached the "found wanting" conclusion as far as air bags are concerned. At the very time that this brief is being written and the brief for the Federal Parties was written, it was reviewing proposals for an air bag demonstration project to design, fabricate and evaluate a kit for retrofitting the automobiles of one or more state police fleets for air bags and had entered into an agreement with the General Services Administration for the purchase by the Federal Government of 5,000 1985 model year vehicles equipped with air bags. *Ibid.*, fn. 12, p. 12, citing news items in the *Commerce Business Daily* for October 25, 1982, at p. 1 and the *Wall Street Journal* for December 15, 1982, at p. 11.

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[1] Secretary "Adams insisted that the interlock system met with public obloquy, because it required affirmative action by the occupant, while passive restraints by definition make no such demand. Because passive restraints would not force changes in public behavior, Adams concluded, there was no need to wait for a demonstration program to convert public attitudes." *Pacific Legal Foundation* v. *Department of Transportation*, 593 F. 2d 1338, 1342 (D.C. Cir. 1979); cert. den., 444 U.S. 830 (1979).

Again, as the United States Court of Appeals for the District of Columbia Circuit has well indicated, the agency did not deal with air bags as an obvious alternative in its analysis in Notice 25 because "domestic manufacturers have decided to use"[2] easily detachable seat belts rather than air bags to comply with the standard. *Pet. App.* 63a. The agency also indicated that "although benefits would be *greater* if [larger cars were equipped with air bags] it does not appear that this will happen." *Ibid. (Emphasis supplied.)*

The agency thus placed the announced intentions of the domestic automobile industry over the safety of the American motorist—at least for the time being. As a matter of conscience and undoubtedly urged on by the notions and expertise of its career personnel, it could not "deep six" the idea of air bags forever, as the viable alternative that the American public could accept. This is undoubtedly the reason why the agency is supporting with its dollars the airbagging of state police fleets and government vehicles to be processed in the not too distant future. Parenthetically and *passim*, one might wonder when the *vox populi* will be heard when the agency ex-

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[2] Congress, by statute, provided that belt systems in non-passenger vehicles, convertibles and open-body type vehicles might be "detachable" but did not provide for a "detachable" feature in seat belt systems for passenger vehicles. See § 125, National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. § 1410b(f)(2), stating that "the term 'belt system' means an occupant restraint system consisting of integrated lap and shoulder belts for front outboard occupants and lap belts for other occupants. With respect to (A) motor vehicles other than passenger vehicles (B) convertibles and (C) open-body type vehicles, such term also includes an occupant restraint system consisting of lap belts or lap belts combined with *detachable* shoulder belts." *(Emphasis supplied.)*

periments in a way that will protect only some men in blue and some Federal Government bureaucrats. Be that as it may, such an arbitrary and capricious approach, alone, would require or perhaps demand that the United States Court of Appeals for the District of Columbia Circuit, steeped in the history of this Standard 208 from previous litigation on its docket, would exercise its necessarily narrow jurisdiction as a reviewing court and rescind the action of the agency. See *Pacific Legal Foundation* v. *Department of Transportation, et al., supra.*

The clear and palpable turnabout by the agency after years of endeavoring to secure the safety of the driver and the car passengers by passive restraints represents an abnegation of responsibility by the agency. This would require the reviewing court to halt the arbitrary and capricious activities of the agency, as the latter completely ignored the intent of the safety statute.

In fine, the United States Court of Appeals for the District of Columbia Circuit was correct in finding that NHTSA acted in an arbitrary and capricious manner when it did not first consider some other version of a passive restraint, to wit, the air bag, as an alternative, which would satisfy the statutory criteria.

II. THE AIR BAG PASSIVE RESTRAINT SYSTEM—AN ANALYSIS

A. The Air Bag And Its Operation

An air bag is a fabric bag which, when needed during a major frontal collision, is instantly inflated by nitrogen gas to position itself between an automobile driver and the steering column, or a passenger and the dashboard and windshield. It functions as a pillow that catches the occupant to protect him from being injured from impacting the hard steering column, dashboard or windshield.

The collision between an occupant and a steering column, dashboard or windshield is often called the "second collision," because it occurs a split second after the first collision, the impact of the automobile with another vehicle, a pole or other object. The first collision damages the vehicle; the second collision damages its occupants.

In contrast to such common and complex auto convenience equipment as air conditioning, automatic transmissions and stereo radios, air bag systems are simple, lightweight and inexpensive. An air bag system basically consists of crash sensors, wiring, an inflator and the folded bag. For the driver's side, the inflator and folded bag weigh less than five pounds and are placed in the hub of the steering wheel, out of sight and indistinguishable from many present model steering wheels. The passenger side bag and inflator are installed completely out of sight in the dashboard. Air bag equipped automobiles are essentially indistinguishable from non-air bag cars, except that the former have no shoulder harnesses. As is the case with such other passive (i.e. automatic) emergency protection systems—such as electrical fuses and energy absorbing steering assemblies—air bag systems are completely out of sight and function only in the emergencies for which they are designed.

The operation of the air bag system is remarkably simple. Crash sensors, objects the size of golf balls, are located in the front of the automobile to activate the system in collisions of such severity that, but for the air bag, the occupants would strike the interior of the car during the "second collision" at a velocity of about twelve (12) miles per hour or greater. The sensors do not activate the system at lower striking speeds. In major frontal impacts the sensors close an electrical circuit to an inflator, which then generates nitrogen gas (the major com-

ponent of the air we breathe) to inflate the bag. The sensing, ignition and deployment of the air bag occur in the split second after the collision of the automobile (the first collision) but well before the occupant who is still moving forward has had the second collision with the interior of the car. The deployed air bag catches and cushions the hurtling occupant, limiting his forward motion. Thus, an air bag may prevent death and serious injury.

The entire air bag system is extremely free from wear and breakdown because of its simplicity and the fact that it contains a minimum of moving parts. There is literally nothing to wear out. In addition, nearly all air bag systems include a diagnostic circuit similar to those on present cars which indicate need for maintenance.

An automatic air bag is intrinsically passive in nature, i.e. it requires no action by the vehicle occupants to obtain protection in crashes; a continuous seat belt is likewise intrinsically passive in nature.[3] An easily detachable belt loses its passive nature as soon as it is detached because thereafter action by the vehicle occupants is required to obtain crash protection.

B. The Cost Of The Air Bag

The air bag system is relatively inexpensive because of its simplicity. In the hearing before the National Highway Traffic Safety Administration in this matter, specifi-

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[3] The passive restraints (air bags or continuous seat belts) required by FMVSS 208 would have been subject to dynamic testing (e.g. satisfactory performance in actual automobile crashes with test dummies as occupants). Present day active seat belts, however, are not required to be tested dynamically; they are merely tested statically by laboratory means.

cally on August 5, 1981, Mr. Ralph Rockow, Chairman of this *amicus*, testified as follows concerning the air bag cost to the consumer, based on the production of air bags for two million automobiles:[4]

$ 65 — Module (air bag, inflator, sheet metal)
30 — Sensors, Diagnostic System, Wiring
10 — Slip-ring assembly, Decorative Cover, Misc.
$105 — Total Cost for Parts
37 — Installation & Special Tooling (36%)
$142 — Total Cost per Vehicle
21 — Profit to Manufacturer (15%)
$163 — Cost to Dealer
49 — Dealer Profit for Optional Accessory (30%)
$212 — TOTAL PRICE TO CONSUMER FOR AIR BAG (Including all markups)
$212 — TOTAL PRICE TO CONSUMER
- 27 — Incremental Cost Reduction for Changing from Today's Three-Point Belts to Manual Lap Belt
$185 — PRICE INCREASE PER CAR TO CONSUMER.

Thus, including manufacturer and dealer markup, air bags at this volume would be cheaper than air conditioning and many vinyl roofs, special paint jobs and car radios.

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[4] Of course, as with most manufactured goods, tooling to manufacture and install them is expensive, relative to the cost of each unit. If that tooling cost is spread over many units, the unit price is greatly reduced; if the tooling is spread over few units, the unit price is increased. Thus, as noted in the Final Regulatory Impact Analysis at VI-1 to VI-10 (C.A. App. 000163 to 000172), the unit price of the air bag system is sensitive to economies of scale. Thus, if produced in the small numbers proclaimed by auto manufacturers with tooling costs recovered in the first year, they would be more expensive.

C. The Performance Of Air Bags

The air bag system has been broadly and extensively tested by the U.S. Department of Transportation, foreign and domestic car manufacturers, and foreign and domestic air bag manufacturers. It is safe, reliable and protective. At this stage, there is no doubt but that reliable air bag technology is an entirely practical way to meet the performance standards specified in FMVSS 208. In its Regulatory Impact Analysis of Notice 25, the National Highway Traffic Safety Administration affirmed its earlier conclusion in 1976 by Secretary Coleman (C.A. App. 002065 et seq., especially 002077 and 002107) and in 1977 by Secretary Adams (C.A. App. 001734 et seq., especially 001737, 001742-001744) as to the soundness of basic air bag technology, of the demonstrated effectiveness of air bags in vehicles in use and that the use of air bags would be "considered an acceptable method of compliance with the mandates of the Act."

Air bags have also been proven in actual use on the highways. General Motors Corporation sold more than 10,000 Cadillacs, Buicks and Oldsmobiles with air bags installed pursuant to options exercised by customers during the 1974-1976 model years. That fleet has had an outstanding record of safety performance and reliability. The National Highway Traffic Safety Administration monitors the performance of those General Motors air bag vehicles and the nearly 2,000 other air bag equipped cars on the road; and NHTSA's reports are part of the record in the hearing in this matter before the agency.

This fleet had rolled up almost one billion (1,000,000,000) miles on U.S. and Canadian roads by the end of 1980. There have been air bag deployments in 245 known crashes, protecting 349 front seat occupants during the same period. These crashes occurred throughout

the United States, under all kinds of temperature and weather conditions and in automobiles with high as well as low mileage.[5]

In the years 1975 to 1978 some 93,160 drivers and front seat passengers were killed in crashes of passenger cars in the United States.[6] Authoritative analysts have estimated that 38,724 of these dead Americans would have survived if their cars had been equipped with air bags.[7]

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[5] Appendix A-1 is a population adjusted map of the United States showing the number and distribution by state of air bag deployment crashes from 1972-1979. Appendix A-2 is a table of air bag deployment crashes involving high and low temperatures which shows the imperviousness of the air bag systems to temperature changes in real world settings. Appendix A-3 and Appendix A-4 show a table of air bag—equipped crashes involving vehicles with mileage greater than 40,000 miles at the time of air bag deployment which portrays the reliability of air bag systems despite long use of the automobile. These three appendices were prepared by the Insurance Institute for Highway Safety from data collected and maintained by the Department of Transportation and other public agencies and published in the Insurance Institute for Highway Safety *Status Report*, Vol. 14, No. 14, September 7, 1979.

[6] Appendix A-5 is a list of front seat automobile occupant deaths in crashes by state for 1975, 1976, 1977 and 1978. This appendix was prepared by the Insurance Institute for Highway Safety from Department of Transportation data and published by the Insurance Institute for Highway Safety in Status Report, Vol. 14, No. 14, September 7, 1979.

[7] Appendix A-6 is a table of estimates also by state for 1975, 1976, 1977 and 1978 of those front seat passenger occupants killed who would have survived if their cars had been equipped with air bags. These estimates were made by the Insurance Institute for Highway Safety based on National Highway Traffic Safety Administration effectiveness estimates for air bag systems and published in *Status Report*, Vol. 14, No. 14, September 7, 1979.

An April 21, 1982 crash near Salt Lake City illustrates the ability of air bag systems to reduce the carnage on American roads. Mrs. Lawana Hansen was driving her 81-year-old mother on Interstate I-15 when they hit a fully laden gasoline tank truck, almost head-on, at a closing speed of approximately 100 miles per hour, a crash that normally would have been fatal for both of them. Though somewhat seriously injured (each had a broken leg and one a ruptured spleen), both lived because the air bags cushioned them from the full force of the crash. The 1975 Oldsmobile involved had been purchased second-hand and had over 100,000 miles on it at the time of the crash. The Hansen Family was not aware that the vehicle was equipped with air bags, so completely unobtrusive are air bag systems. This *amicus* has prepared a brochure describing this accident, which is to be found in Appendix B to this brief.

Air bag systems are no longer available in the United States, despite their proven protectiveness. Only Mercedes-Benz offers an air bag system as an option on certain of its models, but this option is not available to Mercedes-Benz purchasers in the United States. The option is selling briskly at over 1,000 per month, even though it is only a driver side air bag and is reasonably priced. This may become another example of technology, developed and perfected in the United States, going overseas to our nation's detriment.

It is important to emphasize that, despite the Mercedes-Benz experience which belies the old Detroit canard that safety does not sell, one cannot buy an air bag equipped automobile in the United State. There is no choice, and therefore no opportunity for market forces to work as an alternative to regulation. No manufacturer offers air bags as original equipment at any price in the

United States market.[8] Retrofitting automobiles is essentially impossible because of the automobile manufacturers' failure to make simple and relatively inexpensive design adjustments of the instrument panel and steering wheel and column to accept an aftermarket air bag system.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PHILIP R. COLLINS
1026 — 16th Street, N.W.
Washington, D.C. 20036
(202) 347-8899
Counsel for *Amicus Curiae*
Automotive Occupant
Protection Association

Of Counsel:
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

February 7, 1983.

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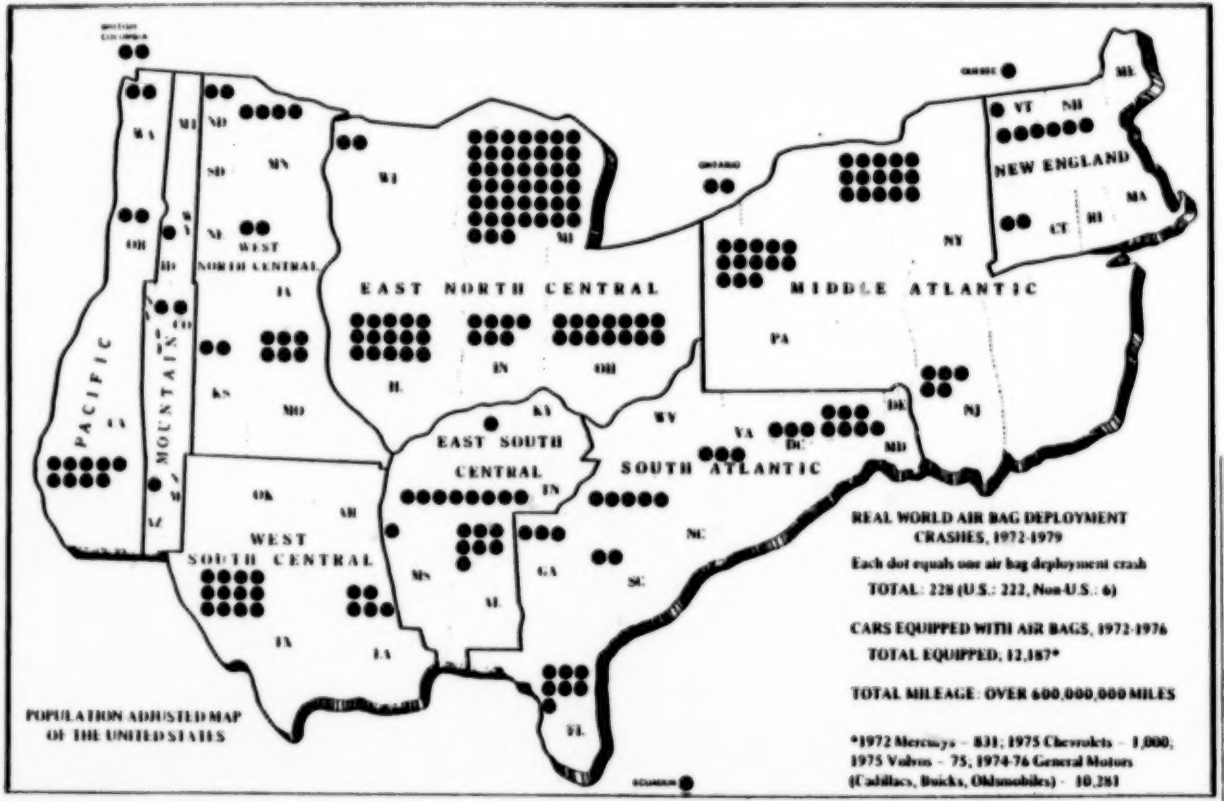
[8] Since this brief was page-proofed but prior to final printing and binding, Mercedes-Benz has announced that driver-side air bag systems will be available in the United States market commencing with model year 1984. See letter of W.R.F. Bodack, President, Mercedes-Benz of North America, Inc., dated January 28, 1983, to the Honorable Raymond Peck, Administrator, NHTSA. *Appendix C.*


NEW ENGLAND
MIDDLE ATLANTIC
EAST NORTH CENTRAL
WEST NORTH CENTRAL
EAST SOUTH CENTRAL
SOUTH ATLANTIC
WEST SOUTH CENTRAL
MOUNTAIN
PACIFIC
POPULATION ADJUSTED MAP OF THE UNITED STATES
REAL WORLD AIR BAG DEPLOYMENT CRASHES, 1972-1979
Each dot equals one air bag deployment crash
TOTAL: 228 (U.S.: 222, Non-U.S.: 6)
CARS EQUIPPED WITH AIR BAGS, 1972-1976
TOTAL EQUIPPED: 12,187*
TOTAL MILEAGE: OVER 600,000,000 MILES
*1972 Mercuys – 831; 1975 Chevrolets – 1,000; 1975 Volvos – 75; 1974-76 General Motors (Cadillacs, Buicks, Oldsmobiles) – 10,281

Status Report, Vol. 14, No. 14, September 7, 1979

AIR BAG DEPLOYMENT CRASHES INVOLVING HIGH AND LOW TEMPERATURES

MAKE & MODEL	LOCATION OF CRASH	DATE OF CRASH	TEMPERATURE AT TIME OF CRASH (F°)
1974 Oldsmobile Delta 88 Royale	Schiller Park, Illinois	2-08-74	20-29°
1973 Chevrolet Impala	Highland, Michigan	2-15-74	19°
1974 Buick Riviera	Houston, Texas	8-23-74	90°
1975 Oldsmobile Regency 98	Cabano, Quebec	11-21-74	20°
1974 Buick Electra Custom	Columbus, Ohio	2-06-75	20's
1974 Oldsmobile Toronado	Syracuse, New York	3-14-75	27°
1973 Chevrolet Impala	Landover, Maryland	5-21-75	89°
1973 Chevrolet Impala	Needles, California	6-07-75	94°
1974 Buick Electra 225	Oyster Bay, New York	7-02-75	87°
1975 Buick Electra Limited	Ashland, New York	12-04-75	24°
1975 Oldsmobile Regency 98	Vaughan, Ontario	12-18-75	12°
1973 Chevrolet Impala	Seattle, Washington	1-01-76	31°
1975 Oldsmobile Toronado	Lombard, Illinois	1-08-76	<0°
1975 Cadillac DeVille	Bay City, Michigan	1-21-76	Lower 20's
1975 Cadillac Fleetwood	Peru, Vermont	3-07-76	30°
1974 Oldsmobile Delta 88 Royale	Lake Villa, Illinois	3-11-76	20-29°
1974 Oldsmobile 98 Regency	Tyler, Texas	6-12-76	85-90°
1975 Oldsmobile Toronado	Boston, Massachusetts	7-19-76	88°
1976 Oldsmobile Delta 88	Camden, New Jersey	7-31-76	85°
1975 Oldsmobile 98	Richmond Cty., North Carolina	9-05-76	85-90°
1974 Buick Electra 225	Montrose, Michigan	11-21-76	30-34°
1976 Cadillac Fleetwood	Elmhurst, Illinois	12-01-76	0-19°
1975 Oldsmobile 98 Regency	Faribault, Minnesota	12-05-76	<0°
1974 Cadillac DeVille	Sterling Heights, Michigan	12-23-76	0-19°
1974 Cadillac Eldorado	Detroit, Michigan	12-26-76	30°
1975 Cadillac Eldorado	Detroit, Michigan	12-28-76	24°
1976 Oldsmobile 98 Regency	New York, New York	1-15-77	26°
1975 Oldsmobile 98	Columbus, Ohio	2-22-77	20-29°
1974 Oldsmobile 98	Mendon, New York	3-01-77	22°
1975 Oldsmobile Toronado	Culver, Oregon	4-02-77	20°
1975 Oldsmobile Toronado	Cocoa Beach, Florida	7-27-77	85-90°
1975 Oldsmobile Regency 98	Lawrence Township, Pa.	12-09-77	9°
1975 Oldsmobile 98	Cass City, Michigan	1-15-78	15-20°
1975 Oldsmobile Delta 88	Moraine, Ohio	2-06-78	7°
1974 Oldsmobile Delta 88	Perry, Michigan	2-14-78	17°
1975 Oldsmobile Toronado	Charlotte, Michigan	3-06-78	28°
1975 Cadillac Fleetwood Talisman	Detroit, Michigan	2-15-79	15°

AIR BAG-EQUIPPED CRASH-INVOLVED VEHICLES WITH MILEAGES GREATER THAN 40,000 AT THE TIME OF AIR BAG DEPLOYMENT

MAKE & MODEL	LOCATION OF CRASH	DATE OF CRASH	MILEAGE AT TIME OF CRASH
1973 Chevrolet Impala	Highland, Michigan	2-15-74	54,999
1972 Mercury Monterey Custom	Valdosta, Georgia	8-22-74	63,084
1974 Oldsmobile 98 Regency	Mayhew, Mississippi	2-19-75	53,754
1973 Chevrolet Impala	Houston, Texas	3-15-75	63,695
1973 Chevrolet Impala	Somerville, Alabama	3-18-75	90,445
1973 Chevrolet Impala	San Antonio, Texas	5-08-75	61,030
1973 Chevrolet Impala	Dalton, Georgia	5-09-75	50,663
1973 Chevrolet Impala	Landover, Maryland	5-21-75	48,795
1973 Chevrolet Impala	Needles, California	6-07-75	67,333
1973 Chevrolet Impala	Milford, Michigan	7-09-75	49,320
1973 Chevrolet Impala	Seattle, Washington	1-01-76	57,165
1973 Chevrolet Impala	West Bloomfield, Michigan	4-11-76	89,255
1974 Oldsmobile Delta 88	Moorpark, California	4-21-76	48,975
1975 Oldsmobile Toronado	DuPage County, Illinois	6-03-76	55,846
1974 Oldsmobile 98 Regency	Amarillo, Texas	7-13-76	45,837
1974 Buick Riviera	Lakewood, Ohio	7-17-76	43,095
1974 Oldsmobile 98	Detroit, Michigan	7-27-76	45,000
1974 Oldsmobile 98	Madison, Wisconsin	8-17-76	69,147
1974 Buick Electra Limited	Baldwin County, Alabama	9-08-76	59,603
1973 Chevrolet Impala	Erie, Pennsylvania	9-14-76	68,031
1974 Buick Riviera	Atchison, Kansas	9-25-76	55,460
1973 Chevrolet Impala	Houghton Lake, Michigan	9-26-76	56,289
1974 Cadillac Eldorado	Mercer, Pennsylvania	10-23-76	43,193
1974 Oldsmobile 98 Regency	Red Oak, Iowa	10-25-76	75,020
1974 Buick Electra 225	Montrose, Michigan	11-21-76	41,744
1973 Chevrolet Impala	Brighton, Michigan	1-21-77	82,354
1974 Oldsmobile 98	Mendon, New York	3-01-77	85,720

AIR BAG-EQUIPPED CRASH-INVOLVED VEHICLES WITH MILEAGES GREATER THAN 40,000 AT THE TIME OF AIR BAG DEPLOYMENT

MAKE & MODEL	LOCATION OF CRASH	DATE OF CRASH	MILEAGE AT TIME OF CRASH
1972 Mercury Monterey	Silver Spring, Maryland	3-08-77	69,809
1974 Oldsmobile 98	Hartford, Connecticut	3-18-77	73,582
1973 Chevrolet Impala	Hicksville, New York	3-27-77	114,958
1974 Oldsmobile 98	Tazewell, Tennessee	4-20-77	47,060
1975 Oldsmobile Toronado	Cortland, New York	4-25-77	51,694
1975 Cadillac Eldorado	Chattanooga, Tennessee	5-23-77	41,890
1974 Oldsmobile Toronado	Gary, Indiana	5-27-77	44,789
1975 Cadillac Eldorado	Port Orchard, Washington	6-07-77	48,857
1973 Chevrolet	La Mirada, California	6-14-77	67,066
1974 Oldsmobile 98	Toledo, Ohio	6-23-77	43,140
1974 Oldsmobile	Independence, Missouri	6-25-77	44,195
1973 Chevrolet Impala	Detroit, Michigan	7-05-77	83,811
1975 Cadillac Coupe DeVille	Akron, Ohio	7-15-77	61,114
1973 Chevrolet Impala	Burnsville, Minnesota	7-16-77	95,842
1975 Buick Electra 225	Minot, North Dakota	7-28-77	43,490
1974 Buick Riviera	Quito, Ecuador	8-17-77	48,531
1974 Buick Electra 225	DeKalb, Illinois	8-18-77	51,778
1973 Chevrolet Impala	Delano, California	9-06-77	93,788
1975 Oldsmobile 98 Regency	Langhorn, Pennsylvania	9-17-77	55,000
1975 Oldsmobile Toronado	Hamilton, Ontario	10-10-77	47,585
1974 Oldsmobile Delta 88	Atchison County, Missouri	10-19-77	50,508
1975 Oldsmobile 98	Janesville Township, Wisconsin	10-23-77	51,382
1973 Chevrolet Impala	Boaz, Alabama	11-07-77	71,878
1974 Oldsmobile Toronado	Kingsport, Tennessee	11-09-77	46,436
1973 Chevrolet Impala	San Antonio, Texas	12-13-77	101,946
1975 Oldsmobile 98	Cass City, Michigan	1-15-78	42,322
1974 Oldsmobile Delta 88	Perry, Michigan	2-14-78	70,106
1975 Cadillac Eldorado	Boise, Idaho	4-21-78	51,549
1973 Chevrolet Impala	Los Angeles, California	4-27-78	72,409
1974 Cadillac Eldorado	Chicago, Illinois	7-22-78	44,102
1973 Chevrolet Impala	St. Louis County, Missouri	12-16-78	88,369

Status Report, Vol. 14, No. 14, September 7, 1979

ACTUAL NUMBERS OF FRONT SEAT PASSENGER CAR OCCUPANT DEATHS

STATE	CALENDAR YEAR 1975	1976	1977	1978	1975-78 Combined
Alabama	529	581	622	639	2351
Alaska	51	49	46	53	199
Arizona	252	271	334	397	1254
Arkansas	279	242	273	283	1077
California	1688	1806	2074	2289	7857
Colorado	273	273	311	313	1170
Connecticut	223	212	238	203	876
Delaware	75	63	68	62	268
D.C.	18	17	19	18	72
Florida	730	814	876	1061	3481
Georgia	695	696	639	799	2829
Hawaii	81	77	79	109	346
Idaho	93	66	136	137	432
Illinois	1076	1088	1149	1127	4440
Indiana	484	454	562	492	1992
Iowa	400	416	342	330	1488
Kansas	284	300	294	305	1183
Kentucky	493	474	544	502	2013
Louisiana	498	461	456	497	1912
Maine	79	111	97	120	407
Maryland	359	296	345	331	1331
Massachusetts	444	424	327	459	1654
Michigan	939	1070	1058	1086	4153
Minnesota	385	424	384	470	1663
Mississippi	284	310	377	461	1432
Missouri	598	630	653	595	2476
Montana	134	130	158	121	543
Nebraska	189	208	174	181	752
Nevada	92	84	122	128	426
New Hampshire	82	92	79	97	350
New Jersey	566	541	576	588	2271
New Mexico	247	226	281	267	1021
New York	1129	1134	1082	1215	4560
North Carolina	845	760	739	813	3157
North Dakota	87	108	82	84	361
Ohio	992	1092	1040	1163	4287
Oklahoma	383	436	438	448	1705
Oregon	267	300	282	337	1186
Pennsylvania	1165	1160	1128	1066	4519
Rhode Island	58	56	57	27	198
South Carolina	448	439	496	502	1882
South Dakota	97	113	92	95	397
Tennessee	413	486	478	508	1885
Texas	1651	1620	1743	1862	6876
Utah	112	100	143	169	524
Vermont	79	68	64	59	270
Virginia	509	523	612	572	2216
Washington	412	431	500	525	1868
West Virginia	256	283	298	266	1103
Wisconsin	489	499	519	554	2061
Wyoming	86	107	100	93	386
ALL STATES	**22096**	**22601**	**23585**	**24878**	**93160**

Status Report, Vol. 14, No. 14, September 7, 1979

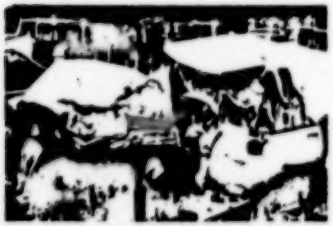
ESTIMATED NUMBERS OF FRONT SEAT PASSENGER CAR OCCUPANT DEATHS THAT COULD HAVE BEEN PREVENTED BY AIR BAGS

STATE	CALENDAR YEAR 1975	1976	1977	1978	1975-78 Combined*
Alabama	266	217	235	238	956
Alaska	20	17	14	19	71
Arizona	69	88	112	138	407
Arkansas	113	96	121	142	472
California	532	662	819	876	2889
Colorado	84	78	97	99	358
Connecticut	100	84	99	88	371
Delaware	17	10	29	28	84
D.C.	7	7	9	7	30
Florida	280	313	324	401	1318
Georgia	312	277	240	325	1155
Hawaii	39	36	31	50	156
Idaho	30	24	50	37	141
Illinois	441	451	467	454	1814
Indiana	166	186	216	197	765
Iowa	162	138	151	149	600
Kansas	131	149	146	135	561
Kentucky	227	227	251	249	954
Louisiana	238	211	194	220	863
Maine	35	48	45	44	171
Maryland	156	160	181	163	660
Massachusetts	211	212	176	243	842
Michigan	305	342	347	374	1369
Minnesota	127	133	128	159	546
Mississippi	78	99	154	192	524
Missouri	272	252	288	251	1063
Montana	56	45	48	35	184
Nebraska	76	86	65	75	302
Nevada	45	28	49	46	168
New Hampshire	37	27	27	42	134
New Jersey	278	282	287	309	1156
New Mexico	89	96	112	109	406
New York	436	513	501	572	2021
North Carolina	338	305	274	330	1247
North Dakota	40	45	33	40	158
Ohio	444	493	466	501	1904
Oklahoma	166	168	174	199	707
Oregon	101	103	112	130	446
Pennsylvania	657	807	423	694	2582
Rhode Island	21	27	26	13	87
South Carolina	192	172	210	204	777
South Dakota	35	41	27	35	138
Tennessee	199	220	217	230	865
Texas	696	675	732	725	2828
Utah	37	35	57	64	193
Vermont	27	23	29	21	99
Virginia	211	242	276	249	978
Washington	143	157	171	197	667
West Virginia	89	102	141	138	467
Wisconsin	244	211	232	251	937
Wyoming	28	42	33	29	132
ALL STATES*	**9103**	**9462**	**9842**	**10516**	**38724**

*Totals do not add because of rounding.

"The thing that amazed me is that the thing was six years old and usually after six years you can't get the windshield wipers to work." Mr. Hansen

"Where will we find another car with air bags? We'll never be satisfied riding in a car without air bags." Mrs. Hansen



"I've always been against air bags because I thought they would ruin the looks of the car, but you really can't tell they're in there." Mr. Hansen

automotive occupant protection association

[illegible] JEFFERSON DAVIS HIGHWAY • SUITE [illegible]
[illegible] VIRGINIA 22202 • PHONE (703) 521-[illegible]

MIRACULOUSLY SAVED BY AN AIR BAG

"I didn't even know the car had air bags. I had seen the red 'air cushion' light whenever I started the car, but I didn't know what it meant." Mr. Hansen

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"It's a miracle my wife and her mother lived. *The steering wheel was pushed back to within inches of the seat back. The brake was pushed to within two inches of the seat. Neither woman had any cuts or marks above their knees, the bags protected them from broken glass."*

Mr. Hansen

On the morning of April 21, 1981, Mrs. Lawana Hansen and her 81-year-old mother were enroute from her home in Sandy, Utah to Twin Falls, Idaho. Heading north along I-15 in Salt Lake City their 1975 Oldsmobile was sideswiped by another vehicle.

Mrs. Hansen lost control as the car swerved across the median, striking a loaded gasoline tanker almost head on. Shattering glass and crushing metal . . . **a crash that normally would have been fatal.**

Lawana Hansen and her mother were seriously injured, **but not killed**, in the accident. Mrs. Hansen suffered a ruptured spleen and a broken leg. Her mother broke a leg and incurred other minor injuries. The accident was so severe that investigators were amazed that both women lived . . . yet, they survived. HOW?

Fortunately for the two women, but totally unknown to them at the time, their car was equipped with air bags. On impact, the air bags filled up, cushioning the women from the full force of the crash.

State and local police — who had never encountered an air bag crash — said the women probably would not have survived without this lifesaving system.

"I wish I could let people know how important air bags are." Mrs. Hansen

Accident investigators later estimated both vehicles were traveling about 50 MPH, resulting in a closing speed of about 100 MPH. In almost every other instance, such a crash would have been fatal to the occupants of the automobile, certainly elderly passengers.

Mrs. Hansen's husband said he purchased the Olds as a used car and was completely unaware that the vehicle was equipped with air bags. The car was one of about 10,000 air bag equipped cars built by General Motors during the early 1970s.

But GM — claiming that the air bags are too costly — no longer makes this lifesaving system available to new car buyers. In addition to the Hansens, there are countless others who can't understand why these safety systems aren't available today.

With more than 50,000 Americans killed on our highways each year, and hundreds of thousands injured, these lifesaving systems shdould be offered to every new car buyer.

The time is now, Congressman . . . there is no legitimate reason to prevent Americans from equipping their new autos with air bags. Technical arguments against the safety devices have been refuted . . . air bags work and they work well. They save lives!

You have the duty and the right to protect our citizens from needless death and injury. You must speak for your constituents and demand that the auto companies build the safest possible cars. DOT's failure to enforce the automatic crash protection standard in a timely fashion will only result in continued deaths and injuries . . . and the question asked by the Hansens and others will remain unanswered . . . "Why?"

C-1

MERCEDES-BENZ OF NORTH AMERICA, INC.

W. R. P. BODACH
PRESIDENT

ONE MERCEDES DRIVE
P. O. BOX 350
MONTVALE, NEW JERSEY 07645
(201) 573-0600

January 28, 1983

Hand Delivered

The Honorable Raymond Peck
Administrator
National Highway Traffic
Safety Administration
United States Department
of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Mr. Peck:

This is in further reference to your letter of January 20, 1982 inviting voluntary industry participation in a joint government-industry effort to offer inflatable restraint technology as an option to the American car buyer.

At the direction of the Board of Management of our parent company, Daimler-Benz A.G., I am pleased to advise you that, effective in model year 1984, Mercedes-Benz of North America, Inc. will offer as an option on certain Mercedes-Benz automobiles sold in the United States a Supplemental Restraint System ("SRS"). Similar to the system currently offered in Europe, the SRS will consist of our standard 3-point manual safety belt supplemented by an air bag and knee bolster on the driver's side and a standard 3-point manual safety belt with an Emergency Tensioning Retractor ("ETR") for the right front passenger.

While exact marketing details have not yet been completed, we currently anticipate a three-phase program to introduce this technology in the American market and to test its market acceptability. During Phase I of this program, which will begin in MY 1984, a minimum of 10 percent of our W126 series vehicles as well as a minimum of 10 percent of our new W201 series vehicles (which will be introduced at that time) will be equipped with the SRS. We anticipate this will involve approximately 5,000 vehicles. During this initial phase, the number of units so equipped may be increased if market response warrants.

In Phase II, which will begin in MY 1985, the option will be available in the model 380SL. In addition, if market acceptability continues to increase, a higher percentage of Phase I vehicles will be included in the program.

Beginning in MY 1986 and based on market experience, we would enter Phase III in which availability of the option could be extended across the entire model range.

The decision to offer this advanced concept of occupant protection in North America is based on two factors. First, favorable acceptance of the system in Europe and second, efforts by your agency to encourage increased seat belt usage in the United States. Because our supplemental restraint system is geared to active belt usage, the adoption of a mandatory seat belt usage law in Germany enabled us to proceed with the introduction of the system there in December 1980. Lack of similar requirements in the U.S. delayed our decision as to availability in this market. Since that time the government's support of programs to encourage seat belt usage and new interest in "buckle up" campaigns make it practical to now offer the Mercedes-Benz Supplemental Restraint System.

Finally, in response to the nationwide program to encourage seat belt usage, I want to inform you that we intend to take the following steps:

1) Mercedes-Benz ads and commercials will carry a motivational message regarding the use of seat belts.

2) Mercedes-Benz employees will be asked to participate in a company-wide "buckle up" campaign.

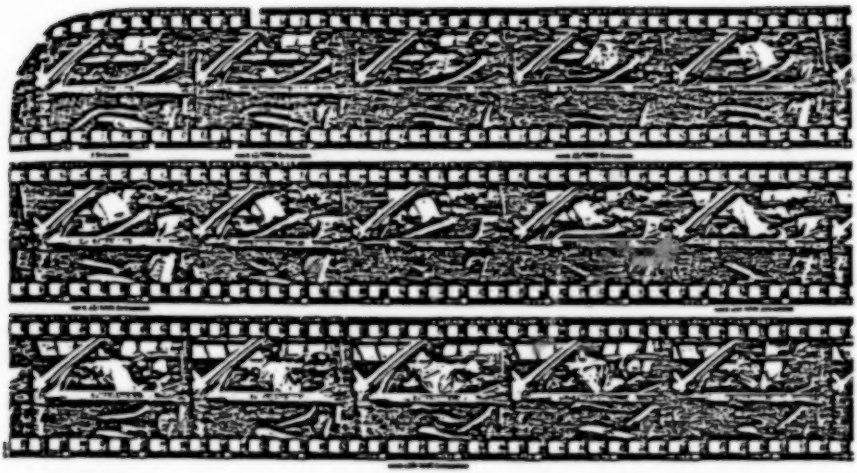
In closing, I am pleased to be able to provide this report to you as a further example of the viability of achieving the goals of your agency through voluntary, cooperative efforts.

Best regards.

Sincerely,

W. Hoelzle

WB/ck



Eine gute Idee darf man nicht aufgeben.

C-4

A GOOD IDEA MUST NOT BE GIVEN UP

Especially not, if it can save human lives.

A good example of that is the air bag. Fifteen years ago this idea was already in the air. However, the experts could not make up their minds whether it was a good idea or not.

We wanted to find out.

Now we are 15 years older, 10 million marks poorer, richer in experience and have the first air bag safety system in the world ready for series production. It works automatically. For no human being can react in a crash in 1/30 of a second.

The air bag can. For a reliable safety device must be able to function as fast as the accident, which also happens in fractions of a second.

Now, it is not only important how fast the air bag is filled with gas, but also how fast it is emptied again.

In 1/6 of a second after the crash, both are over and the air bag hangs flabby at the steering wheel. Long before the human being can find out that something happened at all. This has been proved in thousands of crash tests.

Driving tests have also proved something else:

Concern that the air bag might react when not necessary is not justified. It does not!

Not on the worst rally tracks in the world, not after using full brake at highest speed.

So the air bag is safe. In connection with the safety belts and the fully automatic pretensioning device, also developed by us, functioning in 1/50 of a second and protecting the front seat passenger, the air bag is the best safety system in the world. Above all, it is there to protect chest and head of the human being in an accident. But the air bag and the pretensioning device are not the only safety measures which we were first to investigate, develop, test, and make ready for series production. We have invented the safety cell. We have invented power brakes on all 4 wheels. We have invented the safety steering column and the safety steering wheel.

We, in cooperation with Bosch, have invented the electronic digital controlled super brake, the anti-locking system.

And so on.

Meanwhile, some of this can be found also in other cars.

As, we are sure, in the future also the air bag and the pretensioning device will be found in other cars, both of which you can have from us already by the end of this year.

MERCEDES-BENZ, Your Lucky Star on All Roads

Office-Supreme Court, U.S.
FILED
FEB 7, 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* CENTER FOR AUTO SAFETY, PUBLIC CITIZEN, AND PHYSICIANS FOR AUTOMOTIVE SAFETY IN SUPPORT OF RESPONDENTS

Katherine I. Hall
Counsel of Record
1223 Dupont Circle Building
1346 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 659-1126
Attorney for Amici Curiae Center for Auto Safety, Public Citizen, and Physicians for Automotive Safety

February 7, 1983

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

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BRIEF OF *AMICI CURIAE* CENTER FOR AUTO SAFETY, PUBLIC CITIZEN, AND PHYSICIANS FOR AUTOMOTIVE SAFETY IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* Center for Auto Safety, Public Citizen, and Physicians for Automotive Safety in this case is that the National Traffic and Motor Vehicle Safety Act ("Safety Act") shall be enforced so that motor vehicle deaths and injuries will be reduced. The passive

restraint standard rescinded by the Department of Transportation would prevent thousands of such needless deaths and injuries.

The Center for Auto Safety and Public Citizen are both non-profit public interest organizations. The Center for Auto Safety is dedicated to promoting vehicle and highway safety; and Public Citizen represents consumer interests in a wide range of issues, including vehicle safety. Physicians for Automotive Safety is a membership association of practicing physicians and health care professionals interested in reducing deaths and injuries resulting from automobile accident trauma.

All parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

Automobile accidents happen day in and day out. They kill approximately 125 Americans every day; they injure and disable thousands of others, often permanently. Nearly three times more Americans have died in automobile accidents than have been killed in all the wars this Nation has ever fought. Nearly as many Americans died in car crashes last year as are listed on the walls of the Vietnam memorial.

These figures are familiar. They are compiled year after year, holiday season after holiday season.[1] Reduced to numbers, automobile fatalities are lost in the blizzard of

---

[1]For example, United Press International estimated that at least 346 Americans were killed in car crashes over the recent Christmas weekend. Washington Post, Dec. 28, 1982, at 2.

statistics that we encounter daily. But they conceal a tremendous waste of human life.

This case involves the revocation of a Transportation Department rule whose implementation would prevent thousands of deaths each year on this Nation's highways. The arguments to this Court will be couched in the emotionless doctrines of administrative law. This Court will not hear testimony from mothers, fathers, and children describing the grief automobile casualties have brought to their lives. This Court will not hear the stories of the countless people who have been blinded, disfigured, or afflicted with epilepsy as a result of an automobile crash. Quadraplegics will not tell of the sadness of being paralyzed, of being dependent on others to provide for their simplest needs. But these people and their stories are at the heart of this litigation. It was to prevent these tragedies that Congress enacted the Safety Act.

SUMMARY OF ARGUMENT

The essence of this case is that the National Highway Traffic Safety Administration ("NHTSA") has rescinded the most important vehicle safety standard ever adopted – the passive restraint standard – because of its desire to aid the economically depressed U.S. automobile industry. In its place, NHTSA has proposed a seat belt education program, despite the fact that such efforts repeatedly have failed to produce significant safety benefits.

Congress has charged the Department of Transportation with the responsibility of promulgating mandatory motor vehicle safety standards for the express purpose of reducing "deaths and injuries from traffic accidents." 15 U.S.C. § 1381. Congress delegated this technology forcing mandate to the agency because of its disappointment with

the automobile industry's voluntary safety efforts, and its conclusion that attempts to modify driver behavior had failed.

The passive restraint standard would fulfill the Congressional safety mandate by preventing thousands of automobile deaths and injuries every year. But in violation of its mandate, NHTSA rescinded the Standard on the theory that the plans of some manufacturers to install poorly designed detachable automatic belts rendered the Standard's anticipated benefits uncertain. Rather than rescinding the Standard outright, however, NHTSA should have amended it to require compliance with one of the proven and highly effective passive restraint technologies that already exist, such as continuous belts or air bags. Alternatively, the agency should have retained the Standard as it existed, since even detachable belts would increase belt usage and significantly reduce deaths and injuries.

NHTSA's rescission of the Standard was arbitrary and capricious because it had no safety justification whatsoever. The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. THE SAFETY ACT WAS PASSED TO SAVE LIVES.

In 1966 Congress acted to lessen the toll of human suffering caused by automobile accidents by enacting the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* The express purpose of the Safety Act was to "reduce . . . deaths and injuries from traffic accidents." 15 U.S.C. § 1381. The Senate Report noted the gravity of the problem:

> It should not be necessary to call again the grim roll of Americans lost and maimed on the Na-

> tion's highways. Yet the compelling need for the strong automobile safety legislation which the Commerce Committee is today reporting lies embodied in those statistics: 1.6 million dead since the coming of the automobile; over 50,000 to die this year.

S. REP. No. 1301, 89th Cong., 2d Sess. 1-2 (1966).

Considering the bill, members of Congress lamented the public's, and their own, years of indifference to the tragedies occurring daily on the highways. Senator Bartlett noted:

> Our reactions to these grim figures — and particularly our reactions as policy makers — have too often been those of resignation and complacency. In our more reflective moments we may have sadly realized that technological progress has been an ambiguous thing, a mixed blessing . . . . But a far more appropriate response is one of outrage — that these deaths are not necessary, that something can be done, and of determination that something shall be done.

112 CONG. REC. 14254 (1966).[2]

[2]Similarly, Senator Hart stated: "Impressive auto statistics have been published for many more years than many of us can remember, but until recently there has been no great public or legislative concern. It was just sort of accepted as one of the inescapable dangers of living in a modern age.

In that sense, we have all been guilty, each of us who has ever read the highway casualty lists and shrugged and put the paper down for another sip of iced tea." 112 CONG. REC. 14251 (1966).

Congressman Bennett made a similar point: "When the people in our country read in the newspapers that almost 50,000 people have died during the past year in traffic accidents, they are briefly shocked. But then they read about tragedy every day. Tragedy is something that happens to others. But every 13 minutes some man, woman or child is killed in traffic accidents. Every 18 seconds, somebody is injured seriously in some twisted wreckage . . . ." 112 CONG. REC. 19627 (1966).

To achieve the Act's goals of reducing death and injury from auto accidents, Congress directed the Secretary of Commerce (later, the Secretary of Transportation) to establish mandatory motor vehicle safety standards. Each such standard was required to be practicable, to meet the need for motor vehicle safety, and to be stated in objective terms. 15 U.S.C. § 1392(a). Congress left no doubt that safety was to be the "overriding" and "paramount" concern. S. REP. No. 1301, 89th Cong., 2d Sess. 6 (1966); H.R. REP. No. 1776, 89th Cong., 2d Sess. 16 (1966).

By providing for mandatory standards, the Safety Act as passed differed substantially from the bill originally proposed. The bill as introduced would have empowered the Secretary to establish standards, "but he would have been required to make the determination as to their necessity." S. REP. No. 1301, *supra*, at 15. The legislation actually enacted, by contrast, represented "a determination by Congress that there is a present necessity to establish Federal motor vehicle safety standards." *Id.* Specifically, the Act required that initial motor vehicle safety standards be issued by January 31, 1967, and that new and revised standards be issued no later than January 31, 1968. 15 U.S.C. § 1392(h). Subsequent standards to be issued by the Secretary were to take effect within one year of issuance. 15 U.S.C. § 1392(c).[3]

Congress' decision to provide for mandatory safety standards reflected two principal concerns: a belief that accidents could not be stopped so that it was essential to upgrade the protective design of cars themselves; and a belief that such improvements could not be left to voluntary action on the part of the automobile industry. These concerns are described more fully below.

[3]The Secretary was also permitted to order that a safety standard take effect later than one year from issuance if the Secretary found good cause for the delay. 15 U.S.C. § 1392(c).

1. The Safety Act reflected Congress' conviction that many lives could be saved by improving the safety of the car itself. In particular, Congress hoped to reduce the destructiveness of the "second collision" – "the impact of the individual within the vehicle against the steering wheel, dashboard, [and] windshield." S. REP. No. 1301, *supra*, at 3.[4] Congress clearly recognized "the critical distinction between the causes of the accident itself and the causes of the resulting death or injury." *Id.*

Congress' emphasis on vehicle design represented a change from previous traffic safety efforts, which had concentrated on modifying the behavior of the driver, the "nut behind the wheel." Hearings on S. 3005, Before the Senate Commerce Comm., 89th Cong., 2d Sess. 47 (1966) (statement of Sen. Ribicoff). In focusing on vehicle design, Congress recognized that accidents inevitably would continue to occur, no matter what efforts were made to improve driver performance. In Senator Ribicoff's words:

> the automobile manufacturer has a part to play, taking into account that a human being is never going to be perfect. [S]ince human beings err, since drivers err, since drivers make mistakes, and they are always going to make mistakes, automobiles should be built in such a way as to minimize the damage done.

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[4] *See also*, H.R. REP. No. 1776, *supra*, at 10 ("In the course of the hearings, the committee viewed slides and films which demonstrated over and over again that there is vast room for improvement in the 'second collision' area, and that the second collision victim invariably comes up second best when he is thrust against a steering wheel, a dashboard, a windshield, or knobs and other protrusions in the interior of his vehicle.")

Id.[5] In short, "it is easier to change cars than people." 112 CONG. REC. 19635 (1966) (statement of Rep. Mackay).

2. Congress' decision to mandate federal vehicle safety standards also reflected its disappointment with the automobile industry's previous safety efforts. The Senate Report noted "disturbing evidence of the automobile industry's chronic subordination of safe design to promotional styling and of an overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection." The conviction that "safety doesn't sell," the Report concluded, was widely held in the auto industry and had "plainly resulted in the inadequate allocation of resources to safety engineering." S. REP. No. 1301, *supra,* at 2. And the auto industry's reluctance to incorporate safety features was by no means a recent phenomenon: "Until the industry had been subjected to the prod of heightened public interest and governmental concern, new models showed little improvement in safe design or in the incorporation of safety devices. Such elemental safe design features as safety door latches made their appearance as standard equipment only a decade after their desirability and feasibility had been established." *Id.*

In light of the industry's longstanding reluctance to pursue safe design, Congress concluded that voluntary safety efforts had largely failed. It therefore determined that "the unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll." *Id.* at 4.

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[5]Congressman Springer made a similar point: "Knowing the realities of life we also know that no . . . utopia will be forthcoming and that accidents will continue to happen. That being the case, we need to minimize the damage to life and limb which will be caused by the second collision." 112 CONG. REC. 19630 (1966).

Congress' disappointment with the industry demonstrated no lack of faith in Detroit's ability to build safer cars.[6] To the contrary, Congress expressed confidence that the "creative energies and vast technology of the automobile industry," if properly channelled, could produce impressive safety gains. *Id.* at 1. But in passing the Safety Act Congress refused to wait for the automobile industry to turn its attention to safety, and instead chose to assume itself the responsibility "to ensur[e] safer performance of private passenger cars." *Id.* Congress' determination that "the primary responsibility for regulating the national automobile industry must fall squarely on the Federal Government," as the Senate Report noted, was consistent with its previous regulation of the transportation industry. "Federal standards for the safety of ships," for example, "antedate[d] the Civil War;" the Interstate Commerce Commission had regulated the construction of pullman cars since 1907; and "aviation safety regulations were first authorized in . . . 1926, a year in which domestic airlines carried a total of less than 6,000 passengers."[7] *Id.* at 3-4.

History has borne out Congress' conviction that mandatory motor vehicle safety standards could substantially reduce deaths on our Nation's highways. In October 1981,

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[6]Senator Ribicoff stated: "The time has come for Detroit to accelerate what they now know, and to take sound safety ideas off the shelves and off the drafting boards and out of their experimental laboratories and give them to the American people." Hearings on S. 3005, *supra*, at 47.

[7]Senator Mondale said: "[T]he automobile industry will not stand alone among large corporations after the passage of this bill. Today there are laws regulating most hazardous economic activities and products including food and drugs, air, rail, ship transportation, construction, cosmetics and many others. In fact, the automobile industry now stands virtually alone in its complete unilateral control over the design and merchandising of its products." 112 CONG REC. 14246 (1966).

NHTSA estimated that "a 1980 car is at least 25 percent safer than a mid-1960's one, [thereby resulting in] saving over 73,000 lives since 1966 – or about 10,000 per year today." U.S. Department of Transportation, *Traffic Safety Trends and Forecasts* (Oct. 1981) at 1.[8] Passive restraint technologies now exist that would prevent thousands of additional deaths and injuries each year, but automobile manufacturers have persistently refused to implement these technologies voluntarily. As Congress foresaw, the purposes of the Safety Act can only be fulfilled if the federal Government mandates automobile design changes. In rescinding Standard 208, the Department of Transportation has failed to meet its statutory responsibility to save lives and has thwarted the very purpose of the Act.

II. NHTSA'S RESCISSION OF THE PASSIVE RESTRAINT STANDARD WAS ARBITRARY AND CAPRICIOUS AND LARGELY BASED ON IMPERMISSIBLE FACTORS.

A. NHTSA's Rescission of the Standard Was Arbitrary and Capricious.

Congress' objective in mandating vehicle safety standards was "to prevent deaths and injuries." The passive restraint standard was the most important vehicle safety standard that the Department ever adopted. The Depart-

[8]The number of deaths and injuries prevented by auto safety design improvements since 1966 unfortunately may be far surpassed by the projected rise in casualties anticipated from the increasing percentage of small cars. Without compensating safety improvements, small cars are, on the whole, more dangerous than large cars. Indeed, based primarily on the expanding number of small cars, NHTSA has estimated that the number of fatalities will climb to 70,000 a year by 1990. U.S. Department of Transportation, *Traffic Safety Trends and Forecasts* at 4 (Oct. 1981).

ment's revocation of that Standard was arbitrary and capricious because there is no conceivable safety justification for it.

Before the present Administration took office, every Secretary of Transportation to consider the question agreed that immense safety benefits could be achieved by mandating automatic occupant protection devices. It has been estimated that the Standard rescinded by NHTSA would have saved approximately 6,400 lives and have prevented 120,000 serious injuries annually.[9] Nordhaus, *Comments to Notice of Proposed Rulemaking on Federal Motor Vehicle Safety Standard Concerning Occupant Crash Protection* 1 (May 26, 1981); C.A. App. 511. If NHTSA had amended the regulation to require air bags, the Standard could save up to 9,000 additional lives a year. Department of Transportation, *Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection* 40 (Dec. 6, 1976). Given the critical importance of the passive restraint standard in advancing NHTSA's safety mandate, the Secretary should have had very good reasons for its rescission.

In fact, however, the Secretary's decision was basically illogical and had no safety justification at all. The Secretary rescinded the Standard because of a belief that many manufacturers were planning to comply by installing easily detachable automatic belts. These detachable belts had never been installed in more than a handful of cars and the agency itself deemed them poorly designed. The detachable belts had been made to resemble as closely

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[9]The passive restraint standard also would produce huge net economic benefits for society at large – approximately $2.4 billion dollars every year under the rescinded standard. Nordhaus Comments, *supra*, at 1; C.A. App. 511.

as possible the existing manual belts, thereby frustrating, to the extent possible, the very purpose of the passive restraint standard. NHTSA expressed uncertainty as to whether these newly developed detachable belts would produce the desired safety benefits. But if NHTSA was uncertain about the value of detachable belts, the proper response was not to rescind the Standard, but to require better passive restraints.

It was undisputed throughout NHTSA's rulemaking that there exist other well-designed and effective passive restraint technologies. Indeed, the Government itself noted in 1977 that "[t]he passive restraint standard has been the most tested and researched safety standard in history." Brief for the United States at 66, *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338 (D.C. Cir), *cert. denied*, 444 U.S. 830 (1979). Thousands of GM Chevettes and hundreds of thousands of Volkswagen Rabbits have in recent years been equipped with automatic belts that have increased belt usage rates by an average of about 40 percentage points above the rate of use of manual belts in the same models. Air bags, which have a usage rate of almost 100%, were installed in ten thousand GM cars manufactured during the mid-1970's.[10] The cost of such passive restraint systems, moreover, is modest. NHSTA estimated that passive seat belts would cost the consumer approximately $89 per car, 46 Fed. Reg. 53,419, 53,423 (Oct. 29, 1981); C.A. App. 5; and that air bags, if produced in large volume, would sell at retail for

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[10]In 1970, General Motors in fact announced plans to install air bags as standard equipment in all its passenger cars and light trucks by the fall of 1974. Brief for the United States at 29, *Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659 (6th Cir. 1972).

$200 to $330 per car. Final Regulatory Impact Analysis (Oct. 1981) at VI-10; C.A. App. 172.[11]

NHTSA could have acted to ensure that these effective, inexpensive, lifesaving features were installed in all new cars. At the very least, the agency should have allowed the Standard to remain as it was, since even detachable belts would increase belt usage rates and thereby save lives. As the agency itself acknowledged, it could have amended the Standard to prohibit compliance by use of detachable belts – an action NHTSA admitted would increase usage rates substantially.[12]

The agency gave three basic reasons for its refusal to prohibit detachable belts: (1) a belief that Congress might view with disfavor any use-compelling features; (2) a fear of aggravating the public's supposedly "wide-spread fear" of being trapped in cars following a crash; and (3) a belief that passive restraints might complicate emergency egress from a vehicle. These reasons, as the Court of Appeals correctly concluded, are "hollow." Pet. App. 56a.

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[11]No manufacturer – domestic or foreign – currently offers air-bag-equipped cars for sale in the United States. However, Mercedes-Benz recently announced that it will offer optional airbags for the driver side on some of its 1984 model cars for sale in the United States. Wall Street Journal, January 31, 1983, at 12, col. 2.

[12]NHTSA could also have amended the Standard to require compliance with air bags. As the Court of Appeals correctly noted, NHTSA's "analysis of air bags was non-existent," and "[t]ime and again the agency flatly refused to evaluate the cost-effectiveness of these devices." Pet. App. 62a. NHTSA's failure to consider air bags was not premised on any qualms concerning their effectiveness. In fact, the agency refused to change its "conclusions [made] in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use, such that it could be considered an acceptable method of compliance with the mandate of the Act." Final Regulatory Impact Analysis at XI-4; C.A. App. 264.

First, as to NHTSA's concern about Congressional disfavor, the Court of Appeals noted that the relevant legislative history "did not provide the slightest support for NHTSA's refusal to consider a passive restraint standard that could be satisfied with continuous but not detachable belts." Pet. App. 60a. In any event, the Safety Act does not authorize the agency to base its life and death decisions on its presumptions about Congressional reactions. Second, as to NHTSA's concern about aggravating fears of entrapment, the Court of Appeals observed that only 7% of those responding to the study relied on by NHTSA volunteered that such fears contributed to their decision not to wear seat belts. And the agency's third reason – its concern about emergency egress – is, especially disingenuous. NHTSA itself never made any explicit finding that nondetachable belts would hinder emergency egress.[13] General Motors specifically stated that they would not. 43 Fed. Reg. 21,914 (May 15, 1978); C.A. App. 1724. More to the point, the most serious contributing factor to vehicle deaths and injuries is not that people cannot get out of cars after accidents, but that they are killed or severely injured from the "second collision." As NHTSA itself noted, "occupants wearing belts suffer significantly reduced risk of loss of consciousness, and are commonly able to extricate themselves with relative ease." 46 Fed. Reg. 53,419, 53,424 (Oct. 29, 1981); C.A. App. 6. In short, if people are unable to get out of a car after an accident, the reason is not that they were wearing seatbelts, but that they were seriously injured or unconscious because they were *not* wearing seatbelts.

[13] "NHTSA has never suggested, nor is there any evidence for such a proposition, that the emergency release mechanisms on continuous belts are any more susceptible to jamming or locking in event of a collision than the latch mechanism on detachable or manual belts. Indeed, for all that appears on this record, the emergency release may be *more* dependable than that on a detachable belt." Pet. App. 61a.

NHTSA's eagerness to avoid its safety mandate based on the worst available technology is hardly consistent with the technology forcing intent of the Safety Act. "Lip service aside," as the Court of Appeals put it, "there is no indication of the agency's awareness that it could act positively to develop a passive restraint standard that would advance the purpose of the Safety Act." Pet. App. at 56a.

B. NHTSA's Rescission of Standard 208 Was Not Designed to Further its Statutory Mandate to Save Lives But Was Premised on the Impermissible Ground of Aiding the Automobile Industry.

President Reagan took office during a period of economic hardship for the U.S. automobile industry. Within three weeks of his inauguration, NHTSA had begun the rulemaking process that ultimately led to the revocation of Standard 208. Neither NHTSA nor the White House made any bones about the fact that a principal reason for rescinding the Standard was to save money for U.S. automobile manufacturers.

The Court of Appeals recognized the dominance of this factor in NHTSA's considerations. It observed that the agency based its decision "at least in part 'on the fact that economic circumstances have changed since the standard was adopted in 1977' and 'difficulties of the automobile industry,' citing high unemployment, sales 'at a very depressed level,' and losses 'by even the largest of the domestic manufacturers.' " Pet. App. at 13a, *quoting* 46 Fed. Reg. 21,172 (Apr. 9, 1981). After carefully examining NHTSA's rationale for the rescission of Standard 208, the Court concluded that "[i]t is difficult to avoid the conclusion that NHTSA's analysis . . . has been distorted by solicitude for the economically depressed automobile industry – which

is not the agency's mandate – at the expense of traffic safety, which is." Pet. App. 70a. Judge Edwards in concurrence added that NHTSA's decision "appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand." Pet. App. 75a-76a.

If anything, the Court of Appeals understated the central importance in this rulemaking of NHTSA's, and the Administration's, desire to aid the U.S. auto industry. NHTSA made this intention plain in February 1981 when it took its first public step toward revocation of Standard 208. In proposing to delay for one year implementation of the first phase of the Standard, which originally required large cars to be equipped with passive restraints by model year 1982, the agency explained:

> The difficulties of the automobile industry and some of its members are well-known. Sales continue at a depressed level. Unemployment in the domestic automobile industry remains high, with approximately 200,000 workers indefinitely laid off and more temporarily laid off. Losses by the domestic manufacturers have been reported. These losses come at a time when the domestic manufacturers must continue to spend unprecedented sums to meet the continuing demand for ever more fuel efficient cars and to meet the challenge of foreign car manufacturers.
>
> In this setting, the Department is concerned whether changed economic circumstances in the automobile industry may make the automatic restraint requirements as now scheduled impractical.

46 Fed. Reg. 12,033, 12,033-12,034 (Feb. 12, 1981); C.A. App. 1622-1623.

NHTSA did not cite manufacturers' plans to install detachable belts – the ground on which it now relies – as a reason for the delay. Rather, its decision was explicitly based on the "impact of the standard on the automobile industry;" on the "unanticipated competitive significance of the phase-in schedule," which, by starting with larger cars, disproportionately affected U.S. manufacturers; and on "the unexpectedly fast increase in the proportion of small cars." 46 Fed. Reg. 12,033, 12,034; C.A. App. 1623.

NHTSA admitted that its proposal to delay the Standard would "adversely affect safety," estimating that a one-year delay for large cars alone "would result in approximately 600 more deaths and 4,300 more serious injuries than would occur under the current schedule over the lifetime of the cars." *Id.* The agency endeavored to minimize the significance of these deaths and injuries by suggesting that their "cost" might be offset by "provid[ing] manufacturers with substantial financial and engineering resources to devote toward further improvements in automatic restraint mechanisms and systems as well as other important product programs, particularly efforts to make cars more fuel efficient." *Id.*

NHTSA published in April 1981 its final rule delaying the first phase of the Standard for one year. 46 Fed. Reg. 21,172 (Apr. 9, 1981); C.A. App. 1272. NHTSA defended its concern for the economic well-being of the automobile industry against arguments that such factors were irrelevant under the Safety Act. NHTSA likewise retracted its estimate – made only two months before – that postponement of the Standard would cause hundreds of additional deaths and thousands of injuries; it now contends

that additional casualties would be "minor." 46 Fed. Reg. 21,172, 21,176; C.A. App. 1276.

Concurrently with postponing the Standard's effective date, NHTSA proposed three alternatives for further amending Standard 208. These alternatives were: (1) reversing the sequence of compliance so that small cars would be required to comply first; (2) requiring simultaneous compliance by all cars; and (3) rescinding the automatic occupant protection requirement. Three days earlier, the White House Press Office had issued a 67-page booklet titled "Actions to Help the U.S. Auto Industry" (hereinafter "Actions"). The booklet described "President Reagan's Program for the U.S. Auto Industry" as follows:

> Promptly after taking office, President Reagan appointed a Cabinet-level Task Force to examine the problems of the U.S. auto industry. Based on the advice of the Task Force and other Presidential advisers, he has adopted a positive program to address the immediate problems of depressed sales, record losses, and severe unemployment. The program also addresses the industry's critical longer term needs to offer new competitive models and to reduce unit costs.

Actions at 1; C.A. App. 1282.

The booklet asserted that the auto industry was "burdened with stringent regulatory requirements" which diverted "engineering and managerial talent from the industry's adjustment problems." *Id.* at 2; C.A. App. 1283. The President's program included proposals by NHTSA and the Environmental Protection Agency "to rescind, revise or repropose" 34 specific regulations, thereby saving the auto industry an estimated $1.3 billion over the next five years. *Id.* at 4; C.A. App. 1285. Leading the list of NHTSA's contributions to the program were the one-year

delay of Standard 208 and its proposal to amend the Standard further.[14]

The history of this rulemaking clearly demonstrates that NHTSA ignored its statutory mandate in an effort to aid the U.S. auto industry. Aiding the auto industry, however, is not a permissible objective under the Safety Act.[15] In voting that Act into law, Congress consciously chose to regulate automobile manufacturers in order to promote a clearly specified goal – reduction of deaths and injuries from highway accidents. With a view to achieving that goal, Congress directed NHTSA to establish mandatory motor vehicle safety standards, and unambiguously stated that safety was to be the overriding consideration. Congress quite simply did not charge NHTSA with responsibility for enhancing Detroit's economic prosperity.[16]

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[14]Three days after the booklet's release by the White House Press Office, NHTSA published a notice listing seventeen rulemaking actions – identical to those listed by the White House – which it "intend[ed] to take to reduce unnecessary regulatory burdens upon the motor vehicle and related manufacturing industries." 46 Fed. Reg. 21,203 (Apr. 9, 1981). NHTSA said that its review of these regulations would consider, among other factors, "the policy of the new Administration strongly to prefer the operation of market or individual consumer choice to define and achieve societal goals." *Id.* at 21,204.

[15]Congress, of course, can provide financial assistance to the automobile industry if it so chooses. For example, its decision to pass the federally guaranteed loan program for Chrysler was an affirmative decision to assist the industry.

[16]In any event, federal safety regulations are not responsible for Detroit's economic problems. Professor Nordhaus concluded in his cost-benefit study of Standard 208 that the estimated impact of its rescission would be "miniscule" and that it would lead to "little or no improvement in the health of the domestic automobile industry." Nordhaus Comments, *supra*, at 2. A substantial percentage of the costs of complying with Standard 208 was expended by the manufacturers in research, development and tooling-up before Standard 208 was revoked; such costs are obviously unrecoverable. Finally, the rescission of Standard 208 has no effect on the ability of American manufacturers

III. SEAT BELT EDUCATION CAMPAIGNS DO NOT WORK AND ARE NOT AN EFFECTIVE SUBSTITUTE FOR PASSIVE RESTRAINTS.

Since 1981, NHTSA has seriously suggested only one safety-oriented alternative to passive restraints – seat belt education campaigns. When NHTSA proposed to rescind Standard 208, it also announced plans to undertake an intensive program to increase seat belt usage. NHTSA expressed confidence that "a properly conceived and sustained [seat belt education] program, aided by manufacturers and other levels of government, would make an important contribution to vehicle safety." 46 Fed. Reg. 21,205; 21,206 (Apr. 9, 1981); C.A. App. 13. NHTSA's actual rescission notice a few months later reported that the agency, with expected help from state governments and the private sector, had begun "the process of expanding and initiating major national belt use educational programs of unprecedented scale." 46 Fed. Reg. 53,419, 53,424 (Oct. 29, 1981); C.A. App. 7. NHTSA asserted that its educational campaign might be able to accomplish the same results as Standard 208, but at considerably lower cost. If the educational campaign failed to produce the desired results, NHTSA concluded, it could always reopen the rulemaking proceeding – neglecting to mention that the campaign's failure would be tallied up in deaths and injuries that a new rulemaking could not undo.

NHTSA's optimism about the benefits of seat belt education programs has absolutely no basis in fact or experience. Education campaigns have been mounted nationwide and in selected geographic regions, and they have

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to compete with foreign carmakers. All cars sold in this country must meet the same safety standards, regardless of where they are manufactured, so that Standard 208 would have offered foreign manufacturers no competitive advantage.

invariably failed to bring about any significant increase in seat belt usage. The National Safety Council conducted a $51.5 million dollar program in 1968, and repeated the effort in 1972 and 1973; surveys indicated no increase in seat belt use as a result. Insurance Institute for Highway Safety, *Status Report,* June 24, 1981 at 1. In 1977 the domestic automobile manufacturers financed a $1.75 million campaign to promote belt usage in Detroit and nearby towns; the Department of Transportation studied the effects of this media blitz and concluded that there has been "no response." *Id.* at 3. In short, as Professor Nordhaus noted in his comments to the docket, "previous studies indicate[ ] that public education campaigns to increase belt usage are not effective." Nordhaus Comments, *supra,* at 2.

Other countries have experienced the same disappointing results from seat belt promotional efforts. France mounted a six-month campaign in 1973; the campaign's failure to raise seat belt usage to acceptable levels was one of the main arguments used to support enactment of a mandatory belt use law later that year. A nine-month educational campaign undertaken by the Province of Ontario, Canada in 1974 succeeded in increasing belt usage by only two percent; Ontario passed a mandatory belt usage law in 1975.

NHTSA's sudden enthusiasm about the benefits to be expected from seat belt education is particularly surprising in view of the negative assessments it has made of such prospects in the past. As early as 1969, NHTSA recognized that a very low percentage of vehicle occupants used their seat belts and concluded that "the interests of motor vehicle safety demand the prompt development and installation of passive restraints." 34 Fed. Reg. 11,148 (July 2, 1969); C.A. App. 2503. The persistence of low usage

rates led the Government in 1972 to proclaim that "seat belts have failed as a safety measure and their usage rates are likely to remain low." Brief for the United States at 89, *Chrysler* v. *Department of Transportation*, 472 F.2d 659 (6th Cir. 1972). In 1976, the Secretary of Transportation discussed the low levels of seat belt usage and recognized that "*much of the potential for reducing deaths and injuries through occupant protection systems can be realized only through installation of passive restraints.*" Secretary's 1976 Decision, *supra*, at 30; C.A. App. 2097. (emphasis in original).

Although the Department in 1976 did not recommend immediate implementation of a mandatory passive restraint standard, it did not view an educational campaign to promote use of conventional manual belts as the answer either. Rather, the Department recommended "a large-scale demonstration program to exhibit the effectiveness of passive restraints." *Id.*; C.A. App. 2073. The decision to promulgate Standard 208 in 1977 was strongly influenced by the continuing problem of low belt usage, compounded by the dismal prospects for increasing usage through educational campaigns. 42 Fed. Reg. 34,289, 34,290 (June 30, 1977); C.A. App. 1735. Since 1977, the problem has only become exacerbated, with usage rates dropping from approximately 20% to about 11% today.

Consistent with the spirit of the present Administration, NHTSA has promoted seat-belt education as a sort of "free market" option, dismissing the passive restraint standard as an effort "to force people to accept protection that they do not choose for themselves." 46 Fed. Reg. at 53,426; C.A. App. 8. Given Congress' purposes in passing the Safety Act, however, it is not enough for NHTSA to give people the option of wearing manual belts, to inform them of the advantages of doing so, and to let them suffer

the consequences if they decide not to buckle up. The Government does not promote a "free market" in unsafe drugs, poorly-designed airplanes, or impure foods, and Congress did not intend NHTSA to promote a free market in unsafe cars. NHTSA's notion that it need not protect people who through misinformation, forgetfulness, or irresponsibility fail to use seatbelts makes a mockery of the humane purposes of the Safety Act. Congress was obviously aware that accidents could be reduced if everyone drove more carefully. Shocked by the human tragedies caused by automobile accidents, however, Congress rejected utopian dreams and acted to reduce vehicle deaths and injuries by requiring improvements in vehicle design. NHTSA's mandate is to implement improvements in vehicle design, not to second-guess Congress' judgment about the perfectibility of human nature.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Katherine I. Hall
Counsel of Record
1223 Dupont Circle Building
1346 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-1126

Attorney for Amici Curiae
Center for Auto Safety, Public Citizen, and Physicians for Automotive Safety

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In The

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October Term, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
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v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE EPILEPSY FOUNDATION OF AMERICA AND NATIONAL SOCIETY TO PREVENT BLINDNESS

DEBBIE M. ZUCKERMAN
ALEXANDRA K. FINUCANE*
Epilepsy Foundation of America
4351 Garden City Drive
Landover, Maryland 20785
(301) 459-3700
Counsel for Amici Curiae
*Attorney of Record

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In The

Supreme Court of the United States

October Term, 1982

Nos. 82-354, 82-355, 82-398

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE EPILEPSY FOUNDATION OF AMERICA AND NATIONAL SOCIETY TO PREVENT BLINDNESS

INTEREST OF AMICI CURIAE

The Epilepsy Foundation of America (EFA), founded in 1968, is the only national, charitable, nonprofit voluntary agency in the United States specifically dedicated to the welfare of people with epilepsy.

It is the Foundation's mission to prevent epilepsy and its consequences, and to help persons with epilepsy, their families, and other concerned individuals, overcome the problems associated with the disorder. EFA works to achieve these goals through a broad range of programs of information and education, advocacy, support of research, and the delivery of needed services to people with epilepsy and their families.

Epilepsy is a disorder that often evokes stereotyped images and fears despite vast improvements in medical knowledge and treatment of the condition. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with epilepsy. The Foundation has encouraged society to view the person with epilepsy in a realistic fashion – as an individual who has many capabilities and whose dysfunction is often quite limited in scope and in time.

At the same time the Epilepsy Foundation has always recognized that epilepsy and its consequences can have a severe adverse impact on individuals and their families with a resultant high cost to these individuals and to society.

The National Society to Prevent Blindness, a nonprofit, independent, voluntary health agency, has since 1908 been dedicated to reducing and ultimately to eradicating the 23,000 needless cases of blindness that occur in the United States each year.

The Society's sole purpose is the prevention of blindness. One area in which prevention is particularly effective is eye injuries, which have caused nearly one million people in the United States to suffer visual impairments. Five percent of all eye injuries from consumer products occur

in connection with automobiles. The Society has joined this Brief due to its interest in the employment of effective measures to prevent these injuries.

The purpose of this *amicus curiae* brief, filed with the written consent of the parties,[1] is to present the Court with information on the causes and consequences of epilepsy and blindness, with particular emphasis on the high individual and societal costs associated with these conditions and the obvious benefits to be achieved by their prevention.

Amici, through their staffs and volunteers, are familiar with the issues presented in this proceeding and hope that this brief aids the Court's understanding of the importance of measures aimed at preventing epilepsy and blindness and their devastating consequences.

SUMMARY OF ARGUMENT

In a symposium on the importance of accident prevention, the Director of the Institute of Physical Medicine and Rehabilitation at New York University-Bellevue Medical Center described a statistic which understandably amazed him. He stated that the bloodiest fighting in World War II "and the days of our highest casualties were the first ten days after D-day. We lost, killed and wounded, on the beachheads of Normandy 11,000 men. During those same ten days we lost 26,000 civilians, killed and wounded, on the highways and in the industry of this country. . . ."[2]

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[1]Copies of letters indicating the parties' consent have been filed with the Clerk of the Court.

[2]Rusk, *The Importance of Accident Prevention*, 1956 N.Y.S.J MED. 3853, 3870.

This truly is a startling statistic. What is more shocking, however, is that more than three decades later, these fatal and disabling accidents on our nation's highways continue unabated. There are more than 4 million new cases of motor vehicle injuries each year,[3] and deaths from such injuries have exceeded 50,000 in each year since 1978.[4] The costs associated with these injuries are staggering. In 1975, deaths and injuries from motor vehicle accidents cost our nation 14.4 billion dollars.[5] In 1980 dollars the cost has reached more than 20 billion dollars.

These numbers alone are astounding. Only when compared with other health problems, however, are we better able to see the tragedy represented by the numbers. Among the nation's leading health problems, costs associated with motor vehicle crash injuries are second only to those associated with cancer. These costs exceed those of coronary heart disease and stroke, the other leading killers of Americans.[6] Moreover, automobile accidents are the leading cause of death of Americans between the ages of 1 and 35.[7]

The knowledge and technology necessary to reduce these costly tragedies exist in our nation today, and they have been proven effective. Prevention of death and disability on our nation's highways is a readily achievable goal. Progress toward this goal will be greatly enhanced through

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[3]Hartunian, Smart and Thompson, *The Incidence and Economic Costs of Cancer, Motor Vehicle Injuries, Coronary Heart Disease, and Stroke: A Comparative Analysis,* 70 AM. J. PUB. HEALTH 1249, 1253 (1980) [hereinafter cited as Hartunian].

[4]National Safety Council, *Accident Facts,* (1982).

[5]Hartunian, *supra* note 3, at 1257.

[6]*Id.* at 1249.

[7]Insurance Institute For Highway Safety, *Policy Options for Reducing the Motor Vehicle Crash Injury Cost Burden* at 1 (1981).

reinstatement of Federal Motor Vehicle Safety Standard 208 — the Passive Restraint Standard.

ARGUMENT

I. EPILEPSY AND BLINDNESS ARE TWO OF THE TRAGIC CONSEQUENCES OF PREVENTABLE MOTOR VEHICLE INJURIES

A. Magnitude of the Problem

Head and facial injuries are two of the most common and most serious consequences of motor vehicle accidents. Studies reveal that head injury occurs in 71 percent of persons injured in automobile accidents.[8] Such accidents accounted for the incapacitating head injuries suffered by 18,000 children and adolescents in 1978.[9] In 1977 the Commission for the Control of Epilepsy and Its Consequences ("the Commission") in its report to Congress and the President[10] estimated an annual incidence of 540,000 head injuries from motor vehicle accidents.[11]

Epilepsy has long been recognized as an important complication of head injury. While epilepsy may result from any injury to the head, studies show that the likelihood of developing post-traumatic epilepsy is most closely related to the extent of brain involvement in the injury.[12] The

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[8]Poleck, *The Body . . . What Happens To It In A Crash,* 1967 TRAFFIC SAFETY 17.

[9]National Safety Council, *Accident Facts* (1979).

[10]Commission for the Control of Epilepsy and Its Consequences, *Plan For Nationwide Action On Epilepsy,* Vol. I-IV (DHEW Pub. Nos.: 78-276, 78-279, 78-311) (1978) [hereinafter cited as *Commission's Report*].

[11]*Commission's Report, supra* note 10, Vol. I at 33.

[12]Annegers, Grabow, *et al., Seizures After Head Trauma: A Population Study,* 30 NEUROLOGY 683, 683 (1980); Caveness, *Epilepsy, A Product of Trauma In Our Time,* 17 EPILEPSIA 207, 208 (1976); Walker, Leuchs, *et al., Life Expectancy of Head Injured Men With and Without Epilepsy,* 24 ARCH. NEUROL. 95, 100 (1971).

significance of this connection is evident in light of a recent study placing the number of brain injuries suffered annually by motor vehicle occupants in the United States at nearly 92,000.[13] It must be assumed that a significant proportion of the people represented by this number will develop epilepsy.

Facial injury is another important sequela of motor vehicle accidents. A study was conducted of the annual incidence of hospital-treated facial injuries from vehicle crashes suffered by Dane County, Wisconsin residents.[14] Based upon the population of the United States, the rates from that study yield an estimated 625,000 hospital-treated facial injuries in the nation each year, including 146,000 severe facial lacerations and 29,000 severe facial fractures.[15] When all sources of facial injuries were examined, vehicle crashes were found to be the single leading cause of the most severe of these injuries. Among all types of vehicles involved, automobile occupants accounted for 50 percent of the annual incidence of facial injuries; suffered a disproportionately large percentage of the most severe facial lacerations; and suffered more facial fractures and more severe facial fractures than others injured in vehicle crashes.[16] Hospital medical records mentioned

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[13]Preliminary national estimates calculated in 1983 by the Insurance Institute For Highway Safety based on: Kraus, J.F., Ph.D., Professor of Epidemiology, School of Public Health, Univ. of Calif., at L.A., *A Case Study On Case Specific Incidence of Head Injury in a Defined Population (San Diego County), With Particular Emphasis on Outcomes,"* (to be published).

[14]Karlson, *The Incidence of Hospital-treated Facial Injuries From Vehicles,* 22 J. TRAUMA 303 (1982).

[15]*Id.* at 305.

[16]*Id.*

the steering wheel most often as the object of facial impact for drivers. Windshield impact was also a source of driver injuries, particularly facial lacerations. Windshields were the main source of passenger facial injury, while instrument panels and other structures in the occupant area were involved as well.[17]

Eye injuries account for a large portion of these facial injuries. It is estimated that nationally, there are nearly 39,000 eyelid and periorbital injuries alone, more than 7000 of which are serious.[18] Research using data collected by the National Crash Severity Study indicates the severity of these eye injuries. The study involved occupants of cars involved in collisions, from January 1977 through March 1979, which resulted in the towing of at least one car. The results indicate that one out of every 4000 occupants of towed vehicles suffered some permanent eye impairment and that one eye was blinded for every 7000 occupants. This leads to an annual national incidence of 535 persons suffering a visual impairment and 265 persons blinded in one eye as a result of motor vehicle crashes.[19]

B. The Costs of Epilepsy and Blindness To Individuals and Society Illustrate the Importance of Implementing Available Preventive Measures

As stated earlier motor vehicle accidents cost this nation approximately 20 billion dollars each year. It is extremely difficult, maybe impossible, to grasp what this

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[17] *Id.*

[18] Preliminary report on eye injuries from unpublished data of Trudy Karlson, Associate with the Center for Health Systems Research and Analysis, Univ. of Wisconsin, Madison.

[19] Huelke, O'Day and Barhydt, *Ocular Injuries In Automobile Crashes*, 22 J. TRAUMA 50, 53 (1982).

figure means. We can approach a better understanding of what it represents, to individuals and to society, by realizing that it is comprised of direct and indirect costs,[20] as well as many intangible costs.

Direct costs are actual expenditures, including those for emergency services, inpatient hospital care, insurance administration and litigation. Persons suffering severe nonfatal injuries often have additional expenses for rehabilitative services, drugs and medical supplies, repeated doctor or hospital visits and follow-up tests. For chronic conditions resulting from these injuries, many of these costs continue throughout a person's life.

Indirect costs represent lost productivity stemming from premature death or injury-related disability. This may take the form of a temporary absence from work, or in the case of more severe injuries, an inability to perform all or most of one's work activities due to a permanent disability. In the latter cases indirect costs may also continue for the remainder of one's life.

Epilepsy is a prime example of a condition which results in recurrent direct and indirect costs. The Commission estimated that the cost of epilepsy to the nation was 3.6 billion dollars in 1975.[21] In 1980 dollars, the total cost is 5 billion dollars.

The wide ranging consequences of epilepsy illustrate the enormous costs that individuals and society must bear for the treatment and support of the person with epilepsy. Some of these direct costs are readily apparent – medical

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[20]This discussion is based on the analysis presented in Hartunian, Smart and Thompson, *The Incidence and Economic Costs Of Major Health Impairments,* at 287-349 (1981).

[21]*Commission's Report, supra* note 10, Vol. IV at 118.

costs including physician care, medication, hospitalization, the treatment needs of the severely disabled for continuous or residential care, as well as costs for special education, research, vocational rehabilitation and increased insurance rates. Indirect costs result not only from inability to work but frequently from a reduced period of productivity due to a shortened life span. While some persons with epilepsy and their families are able to shoulder this burden themselves, society absorbs much of the cost in order to sustain and support individuals who have not been able to attain economic independence due to the seriousness of their condition or because of societal attitudes toward them.

The inability to afford these expenses is often a result of the less apparent consequences of epilepsy which significantly add to the personal and societal costs. These are largely the result of the unfortunate social consequences that accompany epilepsy due to the stereotyped images and misunderstanding associated with the disorder. The Commission found that every person affected by epilepsy experiences social, psychological and behavioral problems in degrees ranging from coping with and adjusting to the daily fears and uncertainties associated with epilepsy, to more severe problems which create effective barriers to social adjustment, to obvious psychiatric disorders.

These factors contribute to an unemployment rate among persons with epilepsy which is twice the national average. This rate exists despite dramatic advances in treatment and rehabilitation allowing a large percentage of those with epilepsy to lead seizure free lives, and regardless of federal and state prohibitions against discrimination in hiring because of a handicapping condition. The Commission recognized the even greater percentage of people who "are underemployed, working in low-paying, menial positions with

little opportunity for advancement or change simply because they can find nothing else. The result is an immense waste of human potential among those who have minimum disability and those who are severely handicapped."[22]

The dollar costs are only part of the picture, however. The human costs of epilepsy are immeasurable. We cannot measure the suffering, embarrassment, isolation, and alienation experienced by many people with epilepsy, nor the frustrations of being unable to find effective treatment, of being turned down for a job, insurance or a driver's license, or of being rejected by family and friends. As the Commission stated

> [a]ny effort to picture the problem of epilepsy in terms of numbers conveys little of its true meaning, which must be understood in human terms. Each . . . seizure . . . represents an interruption in the life of an individual — a deviation of function setting that person apart and cutting him off from natural social and vocational contacts. The threat is ever-present — and no one can predict the time or place when a seizure may occur. It is no wonder that so many appear emotionally disturbed. Possibly it is more surprising that a majority do lead normal lives, interrupted only by the occasional episode which they and their associates have learned to take in stride.[23]

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[22] *Commission's Report, supra* note 10, Vol. I at 85.

[23] *Id.* at 26.

II. THE IMPORTANCE OF PREVENTION

A. The Benefits To Be Realized From the Prevention of Motor Vehicle Injuries Cannot Be Overemphasized

Many people develop epilepsy for no known or apparent reason, others from illnesses which may or may not have been avoided. While medical research works toward prevention of epilepsy following exposure to a potential seizure-inducing injury, and toward better treatment once epilepsy develops, more emphasis needs to be placed on earlier prevention, to remove known causative agents. Realizing this, the Commission established as one of its specific goals "[t]o reduce substantially the number of people who suffer from epilepsy by discovering and applying effective methods for the prevention of various forms of epilepsy."[24] The Commission found that in some cases such methods already exist. Its Report cites highway safety as possibly the outstanding example of a situation where available knowledge and existing technology are not being used. There are so many new cases of epilepsy each year for which there is no known cause, that the failure to apply proven preventive measures is inexplicable and inexcusable.

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[24] *Id.* at 13.

B. These Benefits Far Outweigh Any Slight Infringement of Personal Choice Due to the Passive Restraint Program

The Commission highlighted the prevention of head injury, particularly that caused by motor vehicle accidents "because head injury is such a clearly preventable cause of epilepsy, prevention could achieve immediate social and economic benefits, and the remedies are immediately applicable."[25] The Commission realized, however, that the nationwide cry for individual rights is one of the most serious bars to strict federal control of highway regulations. Recognizing that this is similar to the arguments made against mandatory motorcycle helmet laws the Commission stated that this "[c]oncern for individual freedom fails to recognize that it is the insurance companies and ultimately the public who must pay the cost for this type of self expression. . . ."[26]

In comments submitted to the Senate in hearings on automatic crash protection devices the Epilepsy Foundation of America stated that in the area of highway safety the personal liberty argument must be questioned when society must provide medical and custodial care following injury. "[P]ersonal freedoms must be tempered by personal and governmental responsibilities, especially in dealing with issues that have such potential impact upon an individual and his or her family, our health care system, and the well-being of society as a whole."[27]

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[25] *Commission's Report, supra* note 10, Vol. II Pt. 1 at 122.

[26] *Id.* at 123.

[27] Epilepsy Foundation of America, Statement submitted to the Senate Commerce, Science and Transportation Committee, Subcomm. on the Consumer; Hearings on Automatic Crash Protection Devices, Sept. 22, 1977.

CONCLUSION

Motor vehicle accidents are a leading cause of death in this country. Likewise, they are largely responsible for a diminished quality of life due to new cases of epilepsy, loss of sight, and other nonfatal consequences of accidental injury. While we may measure some of the costs of these deaths and injuries, we cannot assign any value to the difficulties physically disabled persons face in trying to achieve full and equal participation in our society.

Although political administrations change, and with them policies and administrative programs, the facts do not change, and the legal arguments must not be allowed to obscure these facts – that while litigation continues, and while administrators seek additional research on protective systems which have already been proven effective, people continue to be killed and disabled on the nation's highways.

For these reasons, the Epilepsy Foundation of America and the National Society to Prevent Blindness urge this Court to affirm the judgment and mandate of the Court of Appeals.

Respectfully submitted

DEBBIE M. ZUCKERMAN
ALEXANDRA K. FINUCANE*
Epilepsy Foundation of America
4351 Garden City Drive
Landover, Maryland 20785
(301) 459-3700
Counsel for Amici Curiae

**Attorney of Record*

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MOTHERS AGAINST DRUNK DRIVERS

Simon Lazarus, III*
Robert E. Litan
POWELL, GOLDSTEIN, FRAZER & MURPHY
1110 Vermont Avenue, N.W.
Suite 1050
Washington, D.C. 20005
(202) 347-0066

Attorneys for Amicus
Mothers Against Drunk Drivers

*Attorney of Record

February 7, 1983

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BRIEF OF *AMICUS CURIAE* MOTHERS AGAINST DRUNK DRIVERS

INTEREST OF AMICUS CURIAE

Mothers Against Drunk Drivers (MADD) is a nationwide organization, headquartered in Fair Oaks, California, with 106 chapters in 34 states. MADD's members are concerned citizens and victims of those killed or maimed in accidents caused by drunk drivers. MADD works for reduction in highway deaths and injuries, especially those caused by drunk drivers, through a variety of efforts, in-

cluding the monitoring of local court sentencings for drunk driving offenses, conducting educational programs and publishing literature to disseminate information about the dangers posed by drunk drivers, and providing counseling services to assist families of victims of accidents caused by drunk drivers.

MADD and its members support passive restraints as necessary equipment to save lives and prevent injuries resulting from auto accidents, especially of those innocent victims of drunk drivers.

QUESTION PRESENTED

When there exist proven and effective passive restraints that will accomplish the Congressional purpose to save lives and prevent injuries, was the rescission of the motor vehicle passive restraint standard by the National Highway Traffic Safety Administration arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law?

STATEMENT OF THE CASE

The factual record, extensive rulemaking over more than a decade and multiple lower court review are well summarized in the Court of Appeals opinion and in the briefs of State Farm Mutual Automobile Insurance Co. (State Farm) and the National Association of Independent Insurers (NAII). MADD joins these statements and makes these additional points:

– Each year over 50,000 people die in highway accidents in the U.S. *Accident Facts, 1982 Edition,* at 58 (National Safety Council) (hereafter "Accident Facts"). The use of alcohol by drivers and pedestrians leads to some 25,000 of these deaths. *1968 Alcohol and Highway*

Safety Report at 1 (U.S. Department of Transportation, National Highway Traffic Safety Administration).

— In 1981 1.9 million[1] Americans suffered disabling injuries in highway accidents. Of those injured, some 150,000 suffered permanent impairments. *(Accident Facts,* p. 3) The percentage of these that were alcohol related is not precisely known, but it is likely about 25 percent.

— Accident data demonstrate that the more severe the crash and resulting injury, the higher percentage that are alcohol related. Typically, in the U.S. alcohol plays a role in less than 10 percent of run-of-the-mill crashes, about 20 percent of crashes involving serious injury to driver or passenger, about 50 percent of all fatal crashes, and about 60 percent of single-vehicle fatal crashes. Ross, *Deterring the Drinking Driver, Legal Policy and Social Control* (Heath & Co. 1982) at xiv.

SUMMARY OF ARGUMENT

Given the evidentiary record before the agency, the Court of Appeals properly overturned NHTSA's rescission of the passive restraint standard. Not only did the agency fail to support its rescission with any evidence, but the only evidence regarding passive restraint systems already on the road thoroughly documented the enormous life-saving and injury-prevention potential of installation of passive restraints in all new cars. Under these facts,

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[1]Using a slightly broader definition of injury that counts all instances in which activity was restricted for at least the day of the incident, the National Health Survey, U.S. Department of Health and Human Services, Public Health Service, National Center for Health Statistics, reports some 4.4 million injuries in highway accidents in 1980. (*Current Estimates for the National Health Interview Survey: United States 1980;* Series 10, Number 139, p. 19)

quarrels about the proper standard of review are beside the point, since the Court of Appeals decision must be sustained on any standard.

Moreover, NHTSA's decision to disregard proven passive restraint technology by relying on public education campaigns to increase seat belt usage and on statements by some automakers that they would install assertedly ineffective passive restraint systems constituted a clear flouting of the agency's statutory mandate. The Court of Appeals properly held that the agency could not so narrow its options "that it fails to heed the goals that Congress has asked it to meet", hence violating its "basic legislative mandate". *State Farm Mutual Automobile Insurance Co.* v. *Departmer' of Transportation,* 680 F.2d 206, 230 (D.C. 1982)

ARGUMENT

I. PASSIVE RESTRAINTS IN AUTOMOBILES WOULD PROVIDE SUBSTANTIAL PROTECTION OVER THE LITTLE-USED MANUAL BELTS AND WOULD SAVE LIVES AND PREVENT INJURIES, INCLUDING THOSE OF INNOCENT VICTIMS OF DRUNK DRIVERS.

Highway deaths and injuries are a staggering and terrible human and economic drain on our society. The toll on our children is especially tragic. Highway injuries are the leading cause of death until age 34. *Motor Vehicle Safety 1980* at A-34-35 (A Report on Activities Under the National Traffic and Motor Vehicle Safety Act of 1966 and the Motor Vehicle Information and Cost Savings Act of 1972, Jan. 1, 1980-Dec. 31, 1980; National Highway Traffic Safety Administration). A 15-year-old boy faces one chance in 100 of being killed in an automobile crash before he is 25. *Technology and Handicapped People: Background Paper #1: Mandatory Passive Restraint Systems in Automobiles: Issues and Evidence* at 7 (Congress

of the United States, Office of Technology Assessment, September, 1982). A serious and disabling injury to anyone is tragic, but it is especially so for a child.

As documented above, much of this death and injury results from alcohol-related automobile crashes. This grim toll must be reduced by the implementation of two general strategies: (1) changing drivers' behavior so they don't drive after drinking and (2) making automobiles more crashworthy so that fewer people are killed or injured in the accidents that do occur.

MADD supports both strategies. Principally it works towards changing society at large and the perception of each American driver of the unacceptability of drinking and driving. This process will require changes in laws, institutions and, most basically, individual attitudes and will take years of concerted effort to achieve.

While changes in attitude and behavio[illegible] are occurring and even after the maximum changes feasible are obtained, alcohol will unfortunately likely continue to be a significant factor in highway death and injury. Thus, prevention of death and injury in accidents caused by drunk drivers will always be important. Moreover, saving lives and preventing injuries in non-alcohol related crashes is also important and is now and will remain a goal of MADD.

For these reasons, MADD supports the installation of the proven passive restraints which, by NHTSA's own estimates, will save approximately 7,000 lives each year and prevent hundreds of thousands of injuries when installed in all cars.[2] Taking the highly conservative estimate

[2]In 1977, NHTSA estimated that even with usage of only 60 percent, installation of automatic seat belts alone would save 6,800 lives and prevent 78,000 injuries each year compared to manual seat belts. 42 Fed. Reg. 34289, 34298 (July 5, 1977) (C.A. App. 1734, 1743). The

that 25 percent of the deaths and injuries resulting from auto accidents are alcohol related, approximately 1,800 deaths and over 25,000 injuries per year that would otherwise be due to alcohol related causes could be avoided each year through the installation of passive restraints of proven reliability in all new cars.

II. OBJECTIONS TO THE STANDARD OF REVIEW EMPLOYED BY THE COURT OF APPEALS ARE UNFOUNDED, AND, IN ANY EVENT, DO NOT WARRANT REVERSAL OF ITS DECISION.

Petitioners make a great deal of alleged errors in the selection and application of the standard of review by the court below. All agree, however, that after some discussion the Court of Appeals applied the traditional "arbitrary and capricious" test of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). MADD submits that for the reasons stated in the briefs of respondents State Farm and NAII that standard of review is proper. The Court of Appeals should be affirmed on that point regardless of whether this Court finds any flaws in the Court of Appeals' reasoning in adopting that standard.

Moreover, arguments that another, narrower standard or a narrower application of the "arbitrary or capricious"

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most recent agency estimates indicated that if the rate of increased usage of 39 percent found in the 1980 Chevette (that was equipped with a non-detachable automatic seat belt) were attained in all new cars, approximately 7,000 fewer people would die and 130,000 fewer injuries would occur over the lifetime of the autos sold in each model year. NHTSA Regulatory Analysis at IV-61, 62 (October 1981) (C.A. App. 117, 118).

standard is appropriate for "deregulation" in general have little force and should be rejected in the circumstances of this case. NHTSA's rescission is not at all analogous to a refusal to enter a new regulatory area. Neither is it a pull-back after a preliminary step was taken but before some threshhold had been crossed. Nor is it an example of deregulation under a statutory scheme that merely requires an agency to implement the "public interest" — an admittedly shifting concept — in an area of substantial tension between competing interests.

Standard 208 and, NHTSA itself, is a creation of the National Traffic and Motor Vehicle Safety Act in which Congress very clearly directed that safety be paramount. The passive restraint portion of Standard 208 was a result of the announced intention of the Department of Transportation as far back as 1969 to obtain automatic protection for automobile occupants because of disappointingly low manual belt usage. And the passive restraint standard prior to rescission was the culmination of 13 years of rulemaking, of development and testing by manufacturers and of proof of the practicability and protectiveness of passive restraints in actual use by American drivers. In these circumstances, no narrower standard of review than the already deferential "arbitrary and capricious" test is justified, irrespective of the merits, if any, of applying a narrower standard in any other case.

In any event, given the bare evidentiary record upon which NHTSA's rescission rested, the agency's elimination of the passive restraint standard was arbitrary and capricious under any standard of review. The Court of Appeals found that NHTSA offered "not one iota of evidence" to support its conclusion that nationwide belt usage would fail to increase by the 13 percentage points that the agency's analysis indicated was required to make the stan-

dard cost-effective. 680 F.2d at 231. Indeed, the only evidence before the agency established that automatic belt systems now on the road have increased usage rates by substantially more than the 13 percentage points threshhold.

Against such a background, disputes about the precise content of the standard of review in this case is akin to asking how many angels can dance on the head of a pin. The fact is that NHTSA's rescission was totally unsupported, a conclusion that cannot be altered by chipping away at the standard of review.

III. THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION'S RATIONALE FOR RESCINDING THE STANDARD WAS IRRATIONAL AND CONTRARY TO THE PURPOSE AND DESIGN OF THE AGENCY'S STATUTORY MANDATE.

NHTSA's rationale for rescission flies in the face of Congressional direction in the National Traffic and Motor Vehicle Safety Act of 1966. In that law Congress directed NHTSA to adopt mandatory standards[3] for the paramount purpose of saving lives and preventing injuries. 15 U.S.C. § 1381. NHTSA's rescission is inconsistent both with the Congressional purpose and the Congressional direction to use mandatory safety standards for its implementation.

Congress understood well the distinction between the two strategies of, on the one hand, changing driver behavior to prevent accidents and, on the other hand, changing

[3]15 U.S.C. § 1392(a) provides: "The Secretary *shall* provide by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." (Emphasis added).

automobiles to make them more crashworthy to reduce deaths and injuries when accidents happen. By its choice of mandatory safety standards, Congress directed NHTSA to pursue the latter strategy under the National Traffic and Motor Vehicle Safety Act of 1966 while authorizing NHTSA to take other steps, including attempting to change driver behavior, under different legislation, the Highway Safety Act of 1966, P.L. 89-564, 23 U.S.C. § 401 *et seq.* *See* Hearings on S. 3005 before the Senate Commerce Committee, 89th Congress, 2d Session 47 (1966) (Statement of Sen. Ribicoff). In explaining the reasons for the Congressional choice of method, Representative Mackay said bluntly "[I]t is easier to change cars than people," 112 Cong. Rec. H18,789 (daily ed. Aug. 7, 1966). Representative Springer added: "Knowing the realities of life we also know that no . . . utopia will be forthcoming and that accidents will continue to happen. That being the case, we need to minimize the damage to life and limb which will be caused by the second collision." 112 Cong. Rec. H18,779 (daily ed. Aug. 17, 1966).

NHTSA's reliance on public education campaigns to change driver behavior by "buckling-up" existing manual belts, while acceptable in its own right, is inconsistent with Congressional direction to use mandatory safety standards *when presented as a substitute for the passive restraint standard.* In sum, the rescission violates the purpose of the National Traffic and Motor Vehicle Safety Act and the Congressional directive to require the industry to produce more crashworthy autos.

The rescission was plainly irrational and also contrary to the agency's statutory mandate because it was based on assertions by some members of the regulated industry that they would comply with the standard, not with the effective equipment already developed and proved on cars in

this country, but with newly designed, avowedly inferior passive belts. As the Sixth Circuit stated in *Chrysler Corporation* v. *DOT*, 472 F.2d 659, 671 (6th Cir. 1972): "[t]he explicit purpose of the Act, as amplified in its legislative history, is to enable the Federal Government to *impel* automobile manufacturers to develop and apply new technology to the task of improving the safety design of automobiles as readily as possible." (emphasis added). Given the proven effectiveness of passive restraint systems in cars already on the road, NHTSA's capitulation to the transparent manipulation by the auto industry expressly contravenes this statutory mandate.

This capitulation to the regulated industry is also inconsistent with the Congressional premise in enacting the National Traffic and Motor Vehicle Safety Act that industry volunteerism had not and could not in the future be relied on to achieve the necessary safety improvements. This premise of the National Traffic and Motor Vehicle Safety Act is well demonstrated in the brief of NAII and of *amicii curiae* Center for Auto Safety, Public Citizen and Physicians for Automotive Safety in this Court, and MADD will not repeat it here. MADD submits to this Court that given this premise, NHTSA's reliance as a basis for rescission on newly proferred and allegedly inferior technology is an acceptance by NHTSA of volunteerism by auto manufacturers at the expense of mandatory standards. As such, it is another basis for overturning the rescission.

CONCLUSION

For these reasons and to save our children and adults threatened by death or injury on the highway, the decision below should be affirmed.

Respectfully submitted,

Simon Lazarus, III*
Robert E. Litan
POWELL, GOLDSTEIN, FRAZER
& MURPHY
1110 Vermont Avenue, N.W.
Suite 1050
Washington, D.C. 20005
(202) 347-0066

Attorneys for Amicus Curiae
Mothers Against Drunk Drivers

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*Attorney of Record

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Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE

JOHN H. QUINN, JR.*
JOHN HARDIN YOUNG
Quinn, Racusin & Young
Chartered
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8980

Attorneys for Amicus Curiae National Association of Insurance Commissioners

*Counsel of Record

THE CADILLAC PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1230

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE

The National Association of Insurance Commissioners [NAIC] respectfully submits this brief as *amicus curiae*. The Court's decision in this case will directly affect the members of NAIC as well as the safety and welfare of the citizens of the states and territories they represent.

This brief is filed with the accompanying written consent of all parties to the case pursuant to Rule 36.2. It is submitted in support of Respondents.

I. INTEREST OF THE AMICUS CURIAE

NAIC is a voluntary, non-profit association of state insurance commissioners. Established in 1871, NAIC represents insurance commissioners from the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa and Guam. NAIC promotes highway safety, injury prevention and the resulting reduction of insurance costs.

Under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (1976 & Sup. IV 1980) [Safety Act], whenever a federal motor vehicle standard is established, the states and their political subdivisions are prevented from adopting standards not identical to the federal standard.[1] The promulgation of federal standards thus has a direct impact on the states. The importance of the state agencies represented by NAIC also is recognized by the Safety Act's provision that the Secretary, in promulgating safety standards, shall consult with "State or interstate agencies (including legislative committees). . ." Act § 103(f)(2), 15 U.S.C. § 1392(f)(2) (1976 & Supp. IV

[1]Section 103(d) of the Act, 15 U.S.C. § 1392(d) (1976 & Supp. IV 1980), in pertinent part provides:

> Whenever a Federal motor vehicle safety standard established under this Subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect or item of equipment which is not identical to the Federal standard.

1980). The statute in this case thus explicitly recognizes that the states have an interest in federal agency action which determines national highway safety policy.

The interest of NAIC and its members in this case stems from their long-standing support of practicable automatic restraint standards which promote motor vehicle safety and reduce insurance costs. The safety standard issued in this case, Federal Motor Vehicle Safety Modified Standard 208 [Standard 208], 42 Fed. Reg. 34,289 (July 5, 1977), promulgated by the National Highway Traffic Safety Administration [NHTSA], is such a standard. A copy of NAIC's most recent resolutions on this subject are set forth in full in Exhibit A to this brief.

This interest is based upon three fundamental objectives:

> First, to promote highway safety and thus to prevent deaths and injuries involving motor vehicles;
>
> Second, to reduce the insurance and other costs incurred when practical safety devices based on existing technology are not mandatorily installed on automobiles; and
>
> Third, to assure that federal and state administrative processes be, and appear to be, fair and impartial in fulfilling the mandates of the legislatures.

These concerns arise from NAIC's recognition of, and frustration in dealing with, the increasing and unnecessary rate of death and injury which occurs on our highways:

- Each year more than 25,000 front-seat occupants of passenger cars die in highway accidents in the United States; another 2.8 million are injured,

and of these, 134,000 are seriously injured.[2] This is the specific group which would be protected by Standard 208. (C. A. App. at 59-63).

- The technology for automatic restraints is now practicable and available for installation in all new automobiles sold in the United States. Since manual belts were first required to be installed in new automobiles in 1966, the rate of their use has been low and steadily declining. In 1981, only 11% of the passenger car front-seat occupants used manual belts. (C. A. App. at 74) Proven automatic restraints under Standard 208 presently exist which, if installed in all new automobiles, would by NHTSA's estimates save between 9,800 to 12,000 lives a year and prevent from 104,000 to 117,000 serious injuries. (C. A. App. at 64-66, 1743) Not saving this number of lives is equivalent to foregoing the use of a proven preventative for half the homicides in the country each year or to foregoing the savings in life achieved by the medical advances that over the last 25 years have virtually eliminated deaths from tuberculosis. (C. A. App. at 514, testimony of Prof. William Nordhaus.)

  The costs of highway deaths and injuries have been estimated in these rulemaking proceedings to exceed $20 billion a year. (C. A. App. at 528) The net annual savings in costs realized by the installation of the automatic safety equipment mandated by Standard 208 are conservatively estimated at $2.4 billion. (C. A. App. at 511-12)

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[2]Serious injuries are defined as those involving at least a compound fracture or dislocated major joints (Joint Appendix in the Court of Appeals at 58). This Joint Appendix has been filed as part of the record before the Court and is cited as C. A. App.

> Many insurance companies regulated by the members of NAIC offer reductions in insurance premiums for automobiles with air bags. If air bags or automatic belts were required as contemplated by Standard 208, insurance rates could be substantially reduced. (C. A. App. at 522-23; *see also,* Brief of Insurance Superintendent Lewis in the court of appeals at 4-5)

NAIC's interest requires affirmance of the court of appeals' holding that the rescission of the automatic restraint provision of Standard 208 was arbitrary and capricious. *State Farm Mutual Automobile Insurance Co. v. Department of Transportation,* 680 F.2d 206 (D.C. Cir. 1982). Unless the court of appeals is affirmed, practical means to prevent highway deaths and injuries, will be limited.

NAIC is directly concerned with any practicable means of promoting highway safety and the costs of failing to do so. Therefore it seeks a negative response to the central question in this case: Given the mandate of the Safety Act to develop practicable means to meet the needs of motor vehicle safety, which NHTSA did in adopting the automatic restraint provisions of Standard 208, can the agency now disregard that mandate by revoking those provisions?

II. SUMMARY OF ARGUMENT

The Court has repeatedly emphasized that action of federal agencies must be measured in light of the pertinent statutory language. *E.g., American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 508 (1981). In this case, NHTSA is required by the Safety Act to "establish by order appropriate Federal motor vehicle safety standards" which "shall be practicable" and which "shall meet the need for motor vehicle safety". Act

§ 103(a), 15 U.S.C. § 1392(a) (1976 & Supp. IV 1980). In compliance with this mandate, NHTSA adopted Standard 208.

The record supports the adoption of Standard 208. It does not support rescission of the automatic restraint provisions of that standard, as attempted by Notice 25, 46 Fed. Reg. 53,419 (October 29, 1981):

- Tens of thousands of lives of front-seat passenger car occupants are lost, and millions of such people are injured in the United States each year because of highway accidents. (C. A. App. at 59-63)

- The use of automatic restraints in automobiles will dramatically increase the number of survivors and decrease the number of persons seriously injured. (C. A. App. at 64-66, 1627, 1743)

- The installation of automatic restraints in newly manufactured automobiles is both technologically and economically practicable. (C. A. App. at 511, 1734, 2065; *see,* Notice 25, C. A. App. 1 at 2; Federal Regulatory Impact Analysis, C. A. App. 16 at 33-38)

Under these circumstances, NHTSA's revocation of the automatic restraint provisions of Standard 208 is contrary to the Safety Act and the evidence before NHTSA.

The Administrative Procedure Act (APA) requires that federal agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" be set aside by the reviewing court. 5 U.S.C. § 706(2)(A) (1976). The court of appeals has found NHTSA's action to be "a paradigm of arbitrary and capricious agency action" (680 F.2d at 208). Accordingly,

it set aside the rescission of the automatic restraint provisions of Standard 208. In taking this action, the court applied the standard of review explicitly set forth by the APA in light of the evidence before NHTSA and the court.

III. ARGUMENT

A. THE SAFETY ACT'S PLAIN MEANING RENDERS UNLAWFUL THE RESCISSION OF THE AUTOMATIC RESTRAINT PROVISION OF STANDARD 208

The starting point for analyzing this case is the language of the Safety Act itself. *American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 508 (1981), citing *Steadman v. Securities and Exchange Commission,* 450 U.S. 91, 97 (1981), and *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979). *See also,* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 572-573 (1965) ("clear purpose" of the statute should control judicial interpretation). Section 103(a), of the Safety Act, 15 U.S.C. § 1392(a) (1976 & Supp. IV 1980), provides,

> The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be *practicable,* shall meet the need for motor vehicle *safety,* and shall be stated in objective terms. (Emphasis added.)

The parties agree that Congress directed the Secretary, through NHTSA, to establish federal motor vehicle standards which are practicable and meet the need for safety.[3] *See, e.g.,* Brief for Federal Parties at 2-3, Brief of Peti-

[3]The Act also requires that federal standards be stated in objective terms, a requirement which is not at issue in this case. Act § 103(a) 115 U.S. § 1392(a) (1976 & Supp. IV 1980).

tioners Motor Vehicles Manufacturers Association of the United States, Inc. *et al.* at 2.

As in *American Textile*, the plain meaning of the statute can be discerned. According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 1780 (1976), the word "practicable" means "possible to practice or perform capable of being put into practice, done, or accomplished."[4] *Accord*, THE OXFORD ENGLISH DICTIONARY, 1218 (1933), ("Capable of being put into practice, carried out into action, effected, accomplished, or done, feasible"); FUNK & WAGNALL'S NEW "STANDARD" DICTIONARY OF THE ENGLISH LANGUAGE, 1947 (1959), ("That can be put into practice; possible of execution or performance; feasible as a practicable scheme.")

The mandate of Section 1392(a) is clear. Once proven and effective automatic restraints exist and are capable of being used, the statutory test of practicability has been met. Standard 208 meets this test. Notice 25 does not. NHTSA is required to establish safety standards under the Safety Act. Once established, those standards cannot lawfully be rescinded unless circumstances are such that the Safety Act purposes are no longer met. Since there is no evidence that such circumstances exist, the automatic restraint provisions of Standard 208 cannot lawfully be rescinded. They have achieved the Safety Act's purpose and, on the record before the Court, will continue to do so.

Over more than a decade, two different types of protection requiring no action by the automobile occupant

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[4]Similarly, Webster's provides the synonyms "possible" and "feasible", the latter being considered by the Court in *American Textile*, 452 U.S. at 509.

(hence "automatic" or "passive" restraints) have been demonstrated – air bags and passive belts. The air bag-equipped cars sold by General Motors in 1978 through 1980 and by Volkswagen from 1974 to the present, and by Toyota in 1981-1982, prove that life-saving and injury prevention can be achieved as a result of the use of automatic restraints. (C. A. App. at 85, 1627, 1735). The Department of Transportation itself has affirmed that Standard 208 was practicable and met the need for motor vehicle safety:

> The agency estimates that at the current 20 percent usage rate, active seat belts prevent 3,000 deaths and approximately 38,000 serious injuries per year. A passive restraint system would increase those figures dramatically. Based on a 60 percent usage rate, passive belts would save an estimated 9,800 lives and prevent 117,000 injuries per year. An air bag system with a 20 percent lap belt usage rate in the agency's estimation will save approximately 12,000 lives and prevent 104,000 serious injuries per year. . .
>
> The compelling logic of mandating a passive restraint system is thus self-evident. . . .

Brief of Department of Transportation at 54-55, *Pacific Legal Foundation v. Department of Transportation,* 593 F.2d 1338, (D.C. Cir.), *cert. denied,* 444 U.S. 830 (1979).

The Safety Act directs NHTSA to save lives and prevent injuries by mandatory standards. Standard 208 followed that direction by requiring a specified level of front seat passenger protection without any action by the occupant. To rescind that feature of Standard 208, as attempted by Notice 25 under the facts of this case, contravenes the Safety Act's plain meaning. By following the plain mean-

ing of the statute, the Court is following the congressional mandate and thus need not determine whether the policy of regulation or deregulation is politically preferable.[5]

NHTSA has decided not to follow the plain meaning of the Safety Act. Instead, it has acquiesced in the automobile industry's efforts to thwart the effectiveness of the Safety Act. At the eleventh hour, before equipment complying with Standard 208 was to be installed, the automobile manufacturers declared they would not use the restraint equipment which had been proven effective. Instead, they offered a new, inferior design for such equipment. Rather than finding the new design not in compliance with the Safety Act and Standard 208, NHTSA revoked the automatic restraint provisions of Standard 208.[6] If the agency believed that the availability of nonconforming restraints posed a serious issue, at most, NHTSA should propose a revision or clarification of Standard 208 to prohibit the use of ineffective belts.[7]

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[5]Cost-benefit analysis, as used by NHTSA in this case, cannot under the Safety Act and the facts be justified as grounds for destroying the effectiveness of Standard 208. *Cf. American Textile*, 452 U.S. at 509-12.

[6]NAIC does not concede that NHTSA had adequate support for its conclusion that the inferior belts would not achieve enough additional usage to justify their use. The court below found this conclusion by NHTSA to be inadequately supported in the record, 680 F.2d at 230-32.

[7]NHTSA and the auto manufacturers argue that by making such a point those supporting Standard 208 are attempting to set the priorities of NHTSA by telling it when to conduct a rulemaking to correct Standard 208. (Brief of the Federal Parties at 35-40, and Brief of Petitioners, Motor Vehicle Manufacturers Association of the United States, Inc. *et al.* at 39-42.) The Safety Act, however, requires that NHTSA take action which promotes motor vehicle safety. The installation of ineffective equipment obviously is contrary to the Safety Act. NHTSA, if it is to follow the congressional mandate, must reject

Rather than supporting NHTSA's conclusion in Notice 25, the evidence unquestionably establishes that automatic restraints are necessary to meet the need for motor vehicle safety. On the record in this case, Notice 25, is contrary to the plain meaning of the Safety Act.

B. THE ADOPTION OF NOTICE 25 IS ARBITRARY AND CAPRICIOUS AND IS CONTRARY TO THE ADMINISTRATIVE PROCEDURE ACT

The Safety Act and the APA provide the standard for review in this case. The Administrative Procedure Act "shall apply to all orders establishing, amending, or *revoking* a Federal motor vehicle safety standard under this subchapter." Safety Act, § 103(b), 15 U.S.C. § 1392(b) (1976 & Supp. IV 1980) (Emphasis added.) The 1974 Amendments to the Safety Act also provide that the rulemaking provisions of Section 553 of the APA, 5 U.S.C. § 553 (1976), apply to orders establishing motor vehicle standards. 15 U.S.C. § 1410b(c)(2) (1976 & Supp. IV 1980).

Section 551(5) of the APA, 5 U.S.C. § 551(5) (1976), defines rulemaking as "agency process for formulating, amending or repealing a rule." Section 551(4) correspondingly provides that "rule" means "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . or practice requirements of an

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the offer to use such equipment, there is no legal basis for any assertion that NHTSA must rescind the Standard rather than amend it. Indeed, fundamental principles of administrative law (not any novel theory) require the agency to follow the mandate of the Safety Act itself. The circumstances presented in this case, when measured in light of the guiding administrative principles, show that rescission of the automatic restraint provisions of Standard 208 is an arbitrary and capricious action which is unlawful.

agency." 5 U.S.C. § 551(4) (1976). *See also,* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:3 at 10 (2d Ed. 1978). Under Section 706(2)(A) of the APA, "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

The APA standards for review were created to avoid the "haphazard, uncertain and variable results" existing before adoption of the APA. *Final Report of Attorney General's Committee on Administrative Procedure* (1941), *reprinted in Senate Comm. on Judiciary, Separation of Powers and The Independent Agencies: Cases and Selected Materials,* S. Doc. 91-49, 91st Cong., 1st Sess. 585, 722 (1969) [Attorney General's Report] (Additional views and recommendations of Messrs. McFarland, Stason and Vanderbilt). The Attorney General's Committee found that in reviewing agency rulemaking "[T]he central issue is one of law, involving the relation of the regulation to the governing statute." Attorney General's Report at 696.

The issue is again squarely presented: Was NHTSA's action in adopting Notice 25 consistent with the mandate of the Safety Act? The court of appeals exhaustively analyzed Notice 25, seeking to ascertain whether NHTSA's action was reasonable under the facts before it (680 F.2d at 230-39). Although Petitioners contend that there are problems with that analysis (Brief for the Federal Parties at 29-36; Brief of Petitioners Motor Vehicle Manufacturers Association of the United States, Inc. *et. al.*, at 37-45; Brief for Petitioners Consumer Alert and Pacific Legal Foundation at 16-20), it is submitted that they have not identified any respect in which the court of appeals erred in its logic or its understanding of the facts

presented. Simply put, Petitioners do not like or accept the Safety Act's mandate that *practicable* safety standards *shall* be established. That mandate has not been rescinded, however. Under these circumstances, it is submitted that the court of appeals correctly found that NHTSA acted arbitrarily in adopting Notice 25 in that:

- There is no evidence to support the conclusion that Standard 208 would not result in substantially increased seat belt utilization.
- The consequences of amending Standard 208 to eliminate compliance by detachable belts were merely superficially identified and not rationally evaluated.
- The consequences of requiring the use of air bags exclusively to comply with Standard 208 were not identified or evaluated.

More pointedly, there is no explanation of how Standard 208 *without* automatic restraint requirements would comply with the Safety Act mandate that practicable means of meeting the need for motor vehicle safety be embodied in a federal safety standard. We submit that this failure by NHTSA is itself arbitrary and capricious and hence a violation of the APA. *See Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402 (1971); *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978) (dictum) ("We agree with the Court of Appeals that regulations promulgated after informal rulemaking . . . may be invalidated by a reviewing court under the 'arbitrary or capricious' standard if they are not rational and based on consideration of the relevant factors." *Id.*)

Under Section 103(b) of the Safety Act and Sections 551(5), 553 and 706(2)(A) of the APA, the scope of review

of agency action revoking a regulation must be the same as for a promulgated regulatory standard. To apply a contrary standard, as urged by the Solicitor General in this case (Brief of the Federal Parties at 22-29) would undermine the credibility of the regulatory process, particularly when the rule sought to be revoked has been subject to over thirteen years of consideration.

The issue of the scope of review for Notice 25 under the Safety Act and the APA, however, need not be reached on the facts of this case. Proven, practicable equipment exists which, if installed, will meet the need of motor vehicle safety by saving lives and preventing injury. Once these facts are conceded, as they must be on the record before the Court, the Court need not examine the record further. Section 103(a) of the Safety Act then requires affirmance of the court of appeals' holding that Notice 25 was promulgated in violation of the Safety Act and the APA and that the automatic restraint provisions of Standard 208 should be retained. This Court, moreover, has recently affirmed that it "will intervene only in what ought to be the rare instance when the. . . standard [of review] appears to have been misapprehended or grossly misapplied" by the courts of appeals. *American Textile,* 452 U.S. at 523, quoting *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951). The court of appeals neither misapprehended nor grossly misapplied that standard in this case.

IV. CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

JOHN H. QUINN, JR.*
JOHN HARDIN YOUNG
Quinn, Racusin & Young
Chartered
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8980
Attorneys for Amicus Curiae
National Association of
Insurance Commissioners
*Counsel of Record

February 7, 1983

EXHIBIT A

The following resolution was adopted by the National Association of Insurance Commissioner at its meeting on December 18, 1981:

Resolution

WHEREAS, on January 20, 1976, the NAIC adopted a resolution urging the Department of Transportation to promulgate, without further delay, Motor Vehicle Safety Standard 208 requiring passive restraints to be installed in all new cars at the earliest possible date; and

WHEREAS, in May of 1977, the Department of Transportation adopted the passive restraint standard, finding the full implementation thereof will save 9,000 lives each year and prevent hundreds of thousands of serious injuries; and

WHEREAS, the Department of Transportation found that in addition to the life savings and injury reducing benefits of the passive restraints standard, implementation thereof would produce substantial benefits to society, generally, including insurance cost savings; and

WHEREAS, many insurers currently offer discounts on first party injury coverages for passive restraint equipped cars because of the economic benefits attributable to the standard; and

WHEREAS, bodily injury liability costs will be reduced substantially over the period of time during which the passive restraint requirement is being implemented; and

WHEREAS, in October in 1977, the United States Congress refused to overturn the standard under veto authori-

ty granted to it in the Motor Vehicle Safety Act, with two-thirds of the Senate endorsing the DOT decision; and

WHEREAS, on June 12, 1978, the NAIC adopted the findings and resolutions of the Cost Containment Task Force of the Automobile Insurance (D3) Subcommittee which included, among other things, a finding that the lack of adequate crashworthiness and occupant protection has significantly contributed to the 49,000 vehicle accident deaths and 1.9 million disabling injuries in 1977, and a resolution urging that passive restraints be made available to the public earlier than required by the DOT, and that DOT continue to work to improve occupant protection in high speed crashes; and

WHEREAS, on October 23, 1981 the National Highway Traffic Safety Administration rescinded the federal passive restraint standard requiring automakers to begin installing passive seat belts or air bags in new cars; and

WHEREAS, the National Association of Independent Insurers, the nation's largest property/casualty insurance trade association, filed a motion on November 25, 1981, in the United States Court of Appeals for the District of Columbia Circuit seeking a stay of the National Highway Traffic Safety Administration rescission order pending judicial review and;

WHEREAS, the continued health, safety and well-being of all Americans using our nation's roads and highways require reinstatement of passive restraint standards at the earliest possible date;

WHEREAS, the NAIC strongly supports passive restraint standards;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Insurance Commissioners hereby reaffirms its historical support for the passive restraint standard of the DOT and pledges strong support of the actions taken to appeal the National Highway Traffic Safety Administration rescission order.

The following resolution was adopted by the National Association of Insurance Commissioners at its June 11, 1982 meeting:

RESOLUTION COMMENDING INDUSTRY AND DEPARTMENT EFFORTS TO REVERSE THE DECISION OF NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION RESCINDING THE FEDERAL PASSIVE RESTRAINT STANDARDS

WHEREAS, on December 18, 1981, the NAIC adopted a resolution reaffirming NAIC's historical support for the passive restraint standard of the DOT and pledging strong support of actions taken by the National Association of Independent Insurers to appeal the National Highway Safety Administration decision to rescind the federal passive restraint standards; and

WHEREAS, the Insurance Industry Highway Safety's Engineering studies show conclusively that passive restraint devices have prevented and will continue to prevent loss of life and reduce the severity of personal injuries; and

WHEREAS, State Farm Mutual Automobile Insurance Company also took steps to appeal the National Highway

Traffic Safety Administration's rescission order in which proceeding the New York Department of Insurance intervened in support of the appeal; and

WHEREAS, the continued health, safety and well-being of all Americans using our nation's roads and highways requires implementation of passive restraints standards at the earliest possible date; and

WHEREAS, the National Association of Independent Insurer's and State Farm Mutual Automobile Insurance Company's support of passive restraint standards, because of their life saving and injury reducing effects, should be commended.

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Insurance Commissioners hereby applauds and commends the National Association of Independent Insurers and the State Farm Mutual Automobile Insurance Company for their effective advocacy in seeking a reversal of the National Highway Traffic Safety Administration's rescission of passive restraint standards and urges that the National Highway Traffic Safety Administration and DOT reconsider its position and act in the public interest to require full implementation of available passive restraint technology.

No. 82-354-CFX
Status: GRANTED

Title: Motor Vehicle Manufacturers Association of the United States, Inc., et al., Petitioners
v.
State Farm Mutual Automobile Insurance Co., et al.

Docketed:
August 30, 1982

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
82-355
82-398

Counsel for petitioner: Perlik,William R.

Counsel for respondent: Solicitor General, Fitzpatrick,James F., Rasenberger,Raymond J., Hammer,Robert S., Kazman,Sam

Entry	Date	Note	Proceedings and Orders
1	Aug 30 1982	G	Petition for writ of certiorari filed.
2	Aug 30 1982		Appendix of petitioner Motor Vehicle Mfr. Assn, et al filed.
4	Sep 14 1982		Order extending time to file response to petition until October 8, 1982.
5	Oct 8 1982		Brief amicus curiae of Amer. College of Preventive Medicine, et al. filed. VIDED.
6	Oct 8 1982	G	Motion of Automotive Occupant Protection Asscciation for leave to file a brief as amicus curiae filed.
7	Oct 8 1982		Brief of respondent Natl. Assn. of Independ Ins. in opposition filed.
8	Oct 8 1982		Brief of respondent St. Farm Automobile Ins., et a in opposition filed. VIDED.
10	Sep 13 1982		Order extending time to file response to petition until October 8, 1982.
11	Oct 12 1982		Order further extending time to file response to petition until October 20, 1982.
12	Oct 20 1982		DISTRIBUTED. November 5, 1982
13	Oct 21 1982	X	Brief of respondent Supt. of Insurance of NY in opposition filed. VIDED.
14	Oct 21 1982	X	Reply brief of petitioner Motor Vehicle Mfr. Assn, et al filed.
15	Nov 8 1982		Petition GRANTED. The cases are consolidated and a total of one hour is allotted for oral argument. **********
16	Nov 8 1982		Motion of Automotive Occupant Protection Association for leave to file a brief as amicus curiae GRANTED.
18	Dec 22 1982		Order extending time to file brief of petitioner on the merits until January 7, 1983.
19	Dec 23 1982		Brief of respondents Consumer Alert, et al. filed. VIDED.
20	Dec 23 1982		Brief of petitioner Motor Vehicle Mfr. Assn, et al filed. VIDED.
21	Dec 23 1982		Joint appendix filed. VIDED.
22	Jan 7 1983		Brief of respondent Federal Parties filed. VIDED.
23	Jan 19 1983	D	Motion of respondents for divided argument filed.
24	Jan 21 1983	G	Motion of the Solicitor General for divided argument filed.
25	Jan 21 1983	D	Motion of petitioners in No. 82-355 for divided argument

No. 82-354-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
26	Feb 4 1983		Brief amicus curiae of Auto. Occupant Protection Assn filed. VIDED.
27	Feb 7 1983		Brief of respondents St. Farm Automobile Ins., et al. filed. VIDED.
28	Feb 7 1983		Brief amicus curiae of Amer. College of Prev. Medicine, et al. filed. VIDED.
29	Feb 7 1983		Brief of respondents Natl. Assn. of Independ Ins., et al. filed. VIDED.
30	Feb 7 1983		Brief amicus curiae of Epilepsy Found. of Amer.,et al filed.
32	Feb 7 1983		Brief amicus curiae of American Insurance Assn. filed. VIDED.
33	Feb 7 1983		Brief amicus curiae of Natl. Assn. of Ins. Commr.'s filed. VIDED.
34	Feb 7 1983		Brief amicus curiae of Mothers Against Drunk Drivers filed. VIDED.
35	Feb 7 1983		Brief amicus curiae of Center For Auto Safety, et al. filed. VIDED.
36	Feb 9 1983		Brief of respondent Supt. of Insurance of N. Y. filed. VIDED.
37	Feb 22 1983		Motion of respondents for divided argument DENIED.
38	Feb 22 1983		Motion of the Solicitor General for divided argument GRANTED.
39	Feb 22 1983		Motion of petitioners in No. 82-355 for divided argument DENIED.
40	Feb 22 1983		Record filed.
41	Feb 22 1983		Certified original record (BOX) received.
42	Feb 24 1983		Record filed.
43	Feb 24 1983		Certified administrative record (Box) received.
44	Mar 24 1983		SET FOR ARGUMENT. Tuesday, April 26, 1983. (1st case) The case is consolidated with Nos. 82-355 & 398. (1 hr)
45	Mar 24 1983		CIRCULATED.
46	Apr 19 1983	X	Reply brief of respondent Consumer Alert, et al. filed. VIDED.
47	Apr 19 1983	X	Reply brief of petitioner Motor Vehicle Mfr. Assn, et al filed. VIDED.
48	Apr 19 1983	X	Reply brief of respondent United States filed. VIDED.
50	Apr 26 1983		ARGUED.